actual possession that held that temporary touching and fingerprints alone are sufficient to support conviction.[40] Further, Judge Smith disparaged the majority for "cherry-pick[ing]" dictionary definitions that describe constructive rather than actual possession.[41] He pointed to alternative dictionaries that define actual possession as "seiz[ing] or gain[ing] control of" a thing, which are actions that can encompass mere touch.[42]

In addition to criticizing the majority for confusing requirements of constructive possession for actual possession, Judge Smith argued that the majority had engrafted an element of an affirmative defense onto the requirements for establishing a prima facie case.[43] Brevity of contact, together with a justification like self-defense or duress, can be raised as an affirmative defense to exculpate a felon from a charge.[44] Such a defense, however, does not negate any element of an offense. Thus, by focusing on the temporariness of touching, the majority had shifted brevity of contact from a defense to the prosecution's burden of proof.

Altogether, Judge Smith argued that the majority had muddled the requirements of actual possession by imbuing elements of constructive possession and the affirmative defense of brevity. In doing so, the majority was opening a "pandora's box" that would force lower courts to "answer myriad bizarre questions" that they are poorly equipped to answer.[45]

While *Smith* marks a positive step in cabining broad interpretations of "possession" under § 922(g), the Fifth Circuit's holding that touching never amounts to possession simply raises the threshold of proof for prosecution. Although this has the beneficial effect of lowering false positives (that is, incorrectly convicting an innocent felon), the tradeoff is an increase in false negatives (that is, incorrectly letting a guilty felon go free). The court should have instead grounded their reasoning in the policy rationale of risk reduction. A framework targeted at assessing risk would reduce both types of error by forcing courts to

[40] *Id.* at 228.
[41] *Id.*
[42] *Id.* at 229.
[43] *Id.* at 230.
[44] *Id.*
[45] *Id.*

find a correlation between a felon's actions, such as touching a firearm, to an increase in danger to life. This rationale would pull the conversation away from disputing over dictionary definitions and back towards the practical aims of criminal justice: reducing overall societal harm by deterring dangerous conduct, promoting felon reintegration into society, and improving institutional efficiency by freeing judicial resources from nonviolent crimes.

The rationale behind felon-in-possession laws is grounded in prevention of danger, risk reduction, and public safety. Rather than penalize a past harm, possession offenses look forward and punish the *potential* for harm. Felons — along with drug users, minors, and illegal aliens — are singled out for handgun possession because these groups supposedly pose an enhanced risk of harm due to certain inherent characteristics.[46] This concern outweighs the Second Amendment right to bear arms because the interest at stake is human life — the "supreme value that the law should strive to protect."[47]

Considering this rationale, the language as well as many current interpretations of § 922(g) by courts are over-inclusive and inconsistent with the statute's purpose. Section 922(g) includes felonies that are not in any way correlated with gun violence, such as mail fraud and marijuana possession.[48] Further, the statute enables the reincarceration of felons for benign actions that create no risk to public safety.[49] The outcome advocated for by the *Smith* dissent provides an example: Smith did not jeopardize the life of any innocent person by touching the gun at his friend's house, and yet Judge Smith still would have upheld his conviction under a strict reading of § 922(g). Taken together, though "possess" is technically a verb, the myriad grab-bag of physical actions that constitute actual possession and the extensive reach of constructive possession make it such that *being* in possession is the crime.[50] Indeed, the only way for a felon to escape liability for possession is to rid his home entirely of guns and ammunition, including those owned by family

[46] Andrew Ashworth, *The Unfairness of Risk-Based Possession Offences*, 5 CRIM. L. PHILOS. 237, 239 (2011).
[47] *Id.* at 250.
[48] Zach Sherwood, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-*Heller *World*, 70 DUKE L. J. 1429, 1431–53 (2021). Section 922(g) also curiously maintains a carveout for certain white-collar crimes. *Id.*
[49] Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIM. 831, 915 (2001).
[50] *Id.*

members.[51] Thus, without requiring a connection to risk, § 922(g)'s prohibition on possession is functionally a status crime.[52]

The principle that an action should be correlated with increased risk in order to qualify for conviction is implicit in many Supreme Court cases involving possession statutes like § 922(g). In *Muscarello v. United States*[53] and *Smith v. United States*,[54] the Supreme Court grappled with 18 U.S.C. § 924(c)(1), which prohibits "carrying" and "using" a firearm "in relation to a drug trafficking crime." In reaching its conclusions in these cases, the Supreme Court discussed at length that the overarching purpose of these statutes is to "combat the dangerous combination of drugs and guns" and "to persuade the criminal to leave his gun at home."[55] In other words, carrying and using a firearm during a drug trafficking crime creates additional risk. This is because drug transactions involve large sums of money, and altercations could easily result given the high pressure and stakes. Possession of firearms increases the risk of injury in such situations because of the inherently deadly nature of guns, as opposed to a fist fight. The Court noted that by contrast, using a gun to scratch one's head at home would not qualify as criminal conduct because it would not substantially increase the risk of injury or fatality.[56]

While § 922(g) lacks a clause explicitly stipulating the risky activity needed to convict for possession like § 924(c)(1), many circuit courts allow juries to consider the riskiness of the defendant's behavior during deliberations.[57] For example, in *United States v. Wilson*, the Ninth Circuit noted that the possibilities for why a felon may have touched a gun are endless, but deliberation is up to the jury to determine if any of the possibilities are sufficient to create a reasonable doubt as to the defendant's guilt.[58] In other words, there are myriad circumstances under which a defendant could come in contact with a gun,

[51] Sherwood, *supra* note 48, at 1443; *cf.* Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 144, 144–48 (2018) (describing conviction of felon for possession after he took over deceased parents' apartment to care for adopted sister because his parents had left box of ammunition on premises).
[52] Dubber, *supra* note 49, at 915 (arguing possession crimes have come dangerously close to rebirth of vagrancy laws).
[53] 524 U.S. 125 (1998).
[54] 508 U.S. 223 (1992).
[55] *Muscarello*, 524 U.S. at 132.
[56] *Smith*, 508 U.S. at 232.
[57] *See, e.g.*, United States v. Wilson, 922 F.2d 1336, 1339 (9th Cir. 1991).
[58] *Id.* (stating in dicta that "mere touching does not amount to possession").

but only some — that is, the types of conduct that create risk to life — warrant conviction for possession. Similarly, in *United States v. Teemer*,[59] the First Circuit recognized that there are many situations in which holding a weapon briefly could "come within the letter of the law but in which conviction would be unjust."[60] The court reasoned that these edge cases were best left to the common sense of prosecutors and juries.[61] Implicit in this case as well as *Wilson* is the idea that many physical acts could qualify as possession under a strict reading of the law. However, many actions do not actually create risk of harm — and because of this lack of actual risk creation, the defendants should not be convicted.

In *Smith*, Judge Haynes failed to articulate the need to connect the defendant's act to the creation of risk. Her holding that touching alone is never sufficient to constitute possession simply raises the threshold for establishing a prima facie case while not actually addressing the underlying question of risk. The effect is both a reduction in false positives and an increase in false negatives.[62] The latter is socially undesirable and is not a necessary tradeoff for achieving the former. On the other end of the spectrum, Judge Smith's proposed rule that categorically equates mere touching with possession would lower the threshold for conviction, thus increasing false positives and decreasing false negatives.

While Judge Haynes's method may be the better of two options under a Blackstonian view — it is better to let ten guilty persons escape than let one innocent person suffer — courts should be aspiring to fashion legal doctrine in a way that reduces *both* types of error. Judge Haynes, in analyzing Smith's case, should have focused the inquiry of actual possession on the degree of risk created by Smith's activities. By centering the analysis on this principle, the court could have shifted this area of law away from formalist thresholds and in favor of a functionalist framework that better protects the rights of felons and other individuals covered by § 922(g) by focusing on individual context. It could have also paved the way for

[59] 394 F.3d 59, 62 (1st Cir. 2005).
[60] *Id.* at 64 (listing examples such as "if a schoolboy came home with a loaded gun and his ex-felon father took it from him, put it in the drawer, and called the police" or "if a mother . . . threw into the trash an envelope of marijuana found in her daughter's bureau drawer").
[61] *Id.*
[62] As noted in *Teemer*, there are many situations where merely touching a gun without exerting ownership or dominion could generate a high amount of risk. *Id.* For example, Judge Haynes's rule would exculpate an ex-felon who, while robbing a convenience store, grasped the store owner's gun behind the counter.

reconstructing the contours of constructive possession to allow for more leniency for felons engaging in nonviolent, otherwise lawful behavior.

A risk-reduction framework would be consistent with many of the Fifth Circuit cases that Judge Haynes and Judge Smith cited in *Smith*. In *United States v. Hagman*,[63] the defendant was a convicted felon charged with possessing and bartering a stolen firearm under 18 U.S.C. § 922(j). The court found that there was no evidence that Hagman touched the guns so there was no actual possession.[64] A risk-reduction inquiry would have reached the same result because the defendant, by failing to touch or come in contact with the guns, did not contribute to the risk-generating activity of trading stolen firearms. In *United States v. Tyler*,[65] the defendant was charged with receiving and possessing stolen property from a federally insured savings and loan association after his fingerprints were found on a check. Under a risk-generation inquiry, the defendant's act of possessing the check would have been tied to the risk (or in this case, the harm that had already occurred) associated with stealing federally insured funds. Finally, in *United States v. Jones*,[66] an officer allegedly saw the defendant remove a handgun from his waistband and place it under a friend's house. The court stated that "if the jury believed the [officer's] testimony *in toto*, the government would have established . . . Jones's direct physical control of the firearm."[67] Under a risk-generation framework, the court would not only determine in a yes-or-no fashion whether Jones held the gun, but also ask whether Jones's holding of the gun generated risk of danger. Unlike the previous two cases, there is no risky illegal activity tied to the defendant's possession of the gun, so a deeper inquiry into the defendant's motives and history would be the next step in this framework.

To be sure, one could argue that courts do not have the authority and/or competency to be deciding the issue of whether a particular action creates risk, as such changes in legal analysis qualify as policymaking and are thus better left to legislatures. However, as the First Circuit stated in *Teemer*, "no legislature can draft a generally framed statute that anticipates every untoward application and plausible

[63] 740 F.3d 1044 (5th Cir. 2014).
[64] *Id.*
[65] 474 F.2d 1079 (5th Cir. 1973).
[66] 484 F.3d 783 (5th Cir. 2007).
[67] *Id.* at 789. The court's ruling on actual possession in this case was dictum only and would not require explicit overruling.

exception."[68] It is the place of the courts to synthesize the rationale underlying these broad statutes and to "fill . . . gaps with glosses and limitations."[69] Moreover, courts serve the other, equally important purpose of safeguarding the rights of those who have less power in the political process. The defendants of felon-in-possession crimes are systematically disenfranchised for life, so legislatures have little incentive to consider their interests.[70] Thus, courts must assume the role of actively intervening to protect their rights.

In holding that touching a gun is insufficient to convict for possession, the Fifth Circuit took a significant step in narrowing the scope of "possession" under § 922(g). But its holding was overly broad, and the majority's reasoning failed to consider the principle of risk reduction that undergirds felon-in-possession laws. Their conclusion that touching alone can never constitute possession simply raises the threshold for establishing a prima facie case, which trades off fewer false positives for more false negatives. The court should have instead centered the contours of analyzing possession offenses around specific, risk-generating activity. This would reduce both types of error by forcing courts to correlate a defendant's actions to an actual increase in risk of danger. Such an inquiry would mitigate overall societal harm while also avoiding reincarceration of felons for non-violent acts. The latter goal not only benefits the individual defendants but also more efficiently allocates judicial resources. Cabining the expansion of statutory possession offenses by tying the defendant's actions to creation of increased risk of danger would thus better serve the aims of criminal justice.

[68] 394 F.3d 59, 64 (1st Cir. 2005).
[69] *Id.*
[70] Dubber, *supra* note 49, at 920.

Applicant Details

First Name	**Zachary**
Last Name	**Damir**
Citizenship Status	**U. S. Citizen**
Email Address	**zdamir@nd.edu**
Address	**Address** **Street** **54746 Twyckenham Dr. #3215** **City** **South Bend** **State/Territory** **Indiana** **Zip** **46637** **Country** **United States**
Contact Phone Number	**6266227355**

Applicant Education

BA/BS From	**California Lutheran University**
Date of BA/BS	**December 2019**
JD/LLB From	**Notre Dame Law School** **http://law.nd.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Notre Dame Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Notre Dame Moot Court Board, Seventh Circuit Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kelley, William
William.K.Kelley@nd.edu
574-631-8646
Pojanowski, Jeffrey
Pojanowski@nd.edu
Waddilove, David
dwaddilo@nd.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zachary A. Damir

54746 Twyckenham Dr. #3215
South Bend, IN 46637

(626) 622-7355
zdamir@nd.edu

May 24, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a second-year student at Notre Dame Law School. I am writing to apply for a one or two-year clerkship in your chambers beginning in 2024. I have family and friends in Virginia and intend to practice law there.

Enclosed is my resume, law school transcript, and writing sample. You will also receive letters of recommendation from the following people. They would be welcome to discuss my candidacy with you.

Dr. David P. Waddilove	Prof. Jeffrey A. Pojanowski	Prof. William K. Kelley
Notre Dame Law School	Notre Dame Law School	Notre Dame Law School
dwaddilo@nd.edu	Pojanowski@nd.edu	wkelley@nd.edu
(734) 277-3194	(574) 631-8078	(574) 631-8646

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Zachary A. Damir

Zachary A. Damir

(626) 622-7355 • zdamir@nd.edu
54746 Twyckenham Dr. #3215 South Bend, IN 46637

EDUCATION

University of Notre Dame Law School — Notre Dame, IN
Juris Doctor Candidate — May 2024
Current GPA: 3.513

- *Notre Dame Law Review*, Executive Articles Editor, Vol. 99
- Notre Dame Moot Court Seventh Circuit Team, Brief Writer and Oralist
- Notre Dame Federalist Society, Vice President
- Teaching Assistant for Property Professor D. P. Waddilove (Spring 2023)
- Faculty Award for Excellence in Natural Resources
- Galilee Public Interest Immersion Course

California Lutheran University — Thousand Oaks, CA
Bachelor of Arts in Political Science, Departmental Honors, summa cum laude — May 2020
Final GPA: 3.91

- Study Abroad: Balliol College, University of Oxford (Fall 2018)
- Political Science Department, Independent Researcher (January – December 2019)
- Debate Team, Captain; Model United Nations

EXPERIENCE

Institute for Justice (IJ) — Seattle, WA
Dave Kennedy Fellowship — May 2023 – August 2023

- Writes legal memos and briefs about constitutional challenges to state and federal regulations or laws on short deadlines before discussing related litigation with IJ attorneys
- Attends and participates in litigation, legal theory, and media workshops and roundtables with IJ specialists
- Contributes to litigation strategy in free speech, economic liberty, educational liberty, and property related cases

University of Notre Dame Law School — South Bend, IN and Virtual
Research Assistant for Professor D.P. Waddilove — May – August 2022

- Read, summarized, critiqued, and discussed cases and scholarly research related to private law and theory
- Edited Prof. Waddilove's writing to synthesize the best possible arguments for his publications
- Crafted academic and legal narratives concerning private law jurisprudence from Prof. Waddilove's research
- Drafted sections of law review articles, one about a new theory of property law and the other about contracts breached during the pandemic, incorporating feedback to create a final product that is ready for circulation

American Enterprise Institute — Washington, D.C.
Government Relations Intern — May – August 2019

- Attended and prepared for Congressional hearings, offered support and political analysis to testifying AEI persons
- Wrote newsletters, memoranda, and summaries of AEI publications and events, used in Congressional mailings
- Worked to plan and present interviews, panels, and networking events involving national officials to the audience
- Completed projects for staff on socioeconomic and foreign policy issues to be used for communications to Congress

Office of then-Majority Leader Kevin McCarthy — Washington, D.C.
Intern—House Leadership Office — January – April 2018

- Drafted and complied memos, policy papers, and interoffice correspondence for the Congressman and his staff
- Researched legislative history and public records to advise staff about members' dispositions before official voting
- Directed U.S. Capitol tours, concisely speaking to large groups, maintaining a friendly and professional appearance

INTERESTS

Neapolitana pizza, Watching bad television shows, European travel, Cello and orchestral music, Cathedral architecture

How to Authenticate This Official Transcript

This official transcript has been delivered to the recipient, and is intended solely for use by that recipient. It is not permissible to replicate this document or forward it to any person or organization other than the identified recipient. Release of this record or disclosure of its contents to any third party without written consent of the record owner is prohibited.

Printed Transcript:
If you have received this transcript as a printed document, you may verify the authenticity by testing the security features noted on the document.

Electronic Transcript:
If receiving electronically, this official transcript has been digitally signed and therefore contains special characteristics. This document will reveal a digital certificate that has been applied to the transcript, and for optimal results, we recommend that this document is viewed with the latest version of Adobe® Acrobat or Adobe® Reader. This digital certificate will appear in a pop-up screen or status bar on the document, display a blue ribbon, and declare that the document was certified by Parchment, with a valid certificate issued by GlobalSign CA for Adobe®. This document certification can be validated by clicking on the Signature Properties of the document.

The Blue Ribbon Symbol: The blue ribbon is your assurance that the digital certificate is valid, the document is authentic, and the contents of the transcript have not been altered.

Invalid: If the transcript does not display a valid certification and signature message, reject this transcript immediately. An invalid digital certificate display means either the digital signature is not authentic, or the document has been altered. The digital signature can also be revoked by the transcript office if there is cause, and digital signatures can expire. A document with an invalid digital signature display should be rejected.

Author Unknown: Lastly, one other possible message, Author Unknown, can have two possible meanings: The certificate is a self-signed certificate or has been issued by an unknown or untrusted certificate authority and therefore has not been trusted, or the revocation check could not complete. If you receive this message make sure you are properly connected to the internet. If you have a connection and you still cannot validate the digital certificate on-line, reject this document.

The current version of Adobe® Reader is free of charge, and available for immediate download at http://www.adobe.com.

UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Damir, Zachary A.
Student ID: XXXXX8462

Date Issued: 01-JUN-2023
Page: 1

Birth Date: 08-16-XXXX

Issued To: Zachary Damir
Parchment DocumentID: TWB5J4RJ
zdamir@nd.edu

Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA	OVERALL TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:												
Fall Semester 2021												
Law School												
LAW 60105	Contracts	4.000	B	12.000								
LAW 60302	Criminal Law	4.000	B	12.000								
LAW 60703	Legal Research	1.000	B+	3.333								
LAW 60705	Legal Writing I	2.000	A-	7.334								
LAW 60901	Torts	4.000	B+	13.332								
		Total		47.999	15.000	15.000	15.000	3.200	15.000	15.000	15.000	3.200
Spring Semester 2022												
Law School												
LAW 60307	Constitutional Law	4.000	B+	13.332								
LAW 60308	Civil Procedure	4.000	B+	13.332								
LAW 60707	Legal Resrch & Writing II-MC	1.000	A-	3.667								
LAW 60906	Property	4.000	B+	13.332								
LAW 70318	Legislation & Regulation	3.000	A	12.000								
LAW 75700	Galilee	1.000	S	0.000								
		Total		55.663	17.000	17.000	16.000	3.479	32.000	32.000	31.000	3.344
Fall Semester 2022												
Law School												
LAW 70137	Trademark & Unfair Comp	3.000	A-	11.001								
LAW 70315	Administrative Law	3.000	B+	9.999								
LAW 73204	Private Law Workshop	2.000	A	8.000								

CONTINUED ON PAGE 2

UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Damir, Zachary A.
Student ID: XXXXX8462

Birth Date: 08-16-XXXX

Date Issued: 01-JUN-2023
Page: 2

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA	OVERALL TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA
University of Notre Dame Information continued:												
LAW 75710	Intensive Trial Ad	4.000	S	0.000								
LAW 75743	Moot Court Appellate	1.000	S	0.000								
LAW 75749	Law Review	1.000	S	0.000								
		Total		29.000	14.000	14.000	8.000	3.625	46.000	46.000	39.000	3.402
Spring Semester 2023												
Law School												
LAW 70305	Constitutional Law II	3.000	B+	9.999								
LAW 70350	Natural Resources Law	3.000	A	12.000								
LAW 70457	Rule of Law Seminar	2.000	A	8.000								
LAW 70841	History of the Common Law	3.000	A	12.000								
LAW 75743	Moot Court Appellate	1.000	S	0.000								
LAW 75749	Law Review	1.000	S	0.000								
LAW 76101	Directed Readings	2.000	A	8.000								
		Total		49.999	15.000	15.000	13.000	3.846	61.000	61.000	52.000	3.513
Fall Semester 2023												
IN PROGRESS WORK												
LAW 70201 M	Evidence	3.000	IN PROGRESS									
LAW 70312 M	Suing the Federal Government	3.000	IN PROGRESS									
LAW 70371 M	Conflict of Laws	3.000	IN PROGRESS									
LAW 70468 M	Post-Conviction Remedies	2.000	IN PROGRESS									
LAW 70736 M	Public Interest Externship	1.000	IN PROGRESS									
LAW 70808 M	Legal Ethics: Prof. R Examined	3.000	IN PROGRESS									
LAW 75737 M	Seventh Circuit Pract Ext FW	2.000	IN PROGRESS									
	In Progress Credits 17.000											

********** TRANSCRIPT TOTALS **********

NOTRE DAME	Ehrs:	61.000	QPts:	182.661
	GPA-Hrs:	52.000	GPA:	3.513
TRANSFER	Ehrs:	0.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	61.000	QPts:	182.661
	GPA-Hrs:	52.000	GPA:	3.513

********** END OF TRANSCRIPT **********

CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.
The most frequently used codes are:

AF Angers, France
DC Washington, DC
FA Fremantle, Australia
IA Innsbruck, Austria
IR Dublin, Ireland
LA London, England (Fall/Spring)
LE London, England (Law-JD)
LG London, England (Summer EG)
LS London, England (Summer AL)
PA Perth, Australia
PM Puebla, Mexico
RE Rome, Italy
RI Rome, Italy (Architecture)
SC Santiago, Chile
SP Toledo, Spain

For a complete list of codes, please see the following website:
http://registrar.nd.edu/pdf/campuscodes.pdf

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:
http://registrar.nd.edu/students/gradefinal.php

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.
I	0	Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
U		Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
V Auditor (Graduate students only).
W Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
P Pass in a course taken on a pass-fail basis.
NR Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
NC No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

TRANSCRIPT NOT OFFICIAL IF WHITE SIGNATURE AND BLUE SEAL ARE DISTORTED

CHUCK HURLEY, UNIVERSITY REGISTRAR

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without the written consent of the student. Alteration of this transcript may be a criminal offense.

COURSE NUMBERING SYSTEM

Previous course numbering systems (prior to Summer 2005) are available at the following website:
http://registrar.nd.edu/faculty/course_numbering.php

Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).
The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX = Pre-College course
ENGL 1 X - XXX = Freshman Level course
ENGL 2 X - XXX = Sophomore Level course
ENGL 3 X - XXX = Junior Level course
ENGL 4 X - XXX = Senior Level course
ENGL 5 X - XXX = 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX = 1st Year Graduate Level Course
ENGL 7 X - XXX = 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX = 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX = Upper Level Graduate Level Course

Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, IN 46556

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in support of Zachary Damir, a member of the class of 2024 at the Notre Dame Law School who has applied for a clerkship in your chambers.

Zach was my student last year in Legislation and Regulation. He wrote one of the best exams in the class, achieving one of a just a few A grades in a very strong group. Overall Zach's performance academic performance has been impressive. I have no doubt that he'll perform at a high level in any clerkship.

I've gotten to know Zach through several office hours visits and several meetings regarding his student note. I really like him. In all candor at first he comes across a bit awkwardly, and I didn't know what to think. But as I've gotten to know Zach I really have come to like him a lot. He's down to earth and funny, and really engaging and interesting in talking about law. His note on statutory parentheticals is terrific—it's a sophisticated treatment of a little-noticed topic and is actually very entertaining to read. His research is impressive and his prose is excellent. Indeed, Zach's note draft is one of the most interesting and unusual student papers I've read in years. I think it has real promise as an article.

I'm please to recommend Zach Damir very highly. He's a very impressive law student who will only become more impressive as he gets more comfortable in professional environments. He'll be fun to have around and will do really good work.

Please let me know if you'd like to talk further about Zach's candidacy.

Respectfully yours,

William K. Kelley

William Kelley - William.K.Kelley@nd.edu - 574-631-8646

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am happy to write in strong support of my student Zachary Damir's application for a clerkship in your chambers. Zach is smart, well-read, intellectually curious, hardworking, and a high-character person who loves the law. Students of his caliber have succeeded at federal district court clerkships and I expect Zach to do the same. I recommend him without reservation.

I have gotten to know Zach in two capacities. First, he was in my torts class last fall. Second, I was assigned to mentor Zach as part of Notre Dame Law School's program for First Generation professional students. Both dimensions give me great confidence in his prospects.

First, Zach's legal abilities. I first want to discuss his torts grade and his broader academic performance so far. Zach "only" received a B+ on his blindly graded exam. We have a mandatory curve and distribution at Notre Dame Law School and I am told by others, including judges, that it is stricter than some of our peer and competitor institutions: the median exam must lie roughly at the border of B/B+. That said, I was surprised Zach only got a B+. In my discussions with him in class and office hours, he was very sharp. He immediately mastered the basics, quickly moved to more complicated, high-level concepts and doctrinal questions, and worked with them with great facility. I think the most likely explanation for his fine-but-not-stellar performance last year was that he was still learning how to translate his legal acumen to an in-class exam. Indeed, Zach's GPA has risen every semester. His current cumulative average of 3.4 qualifies him to graduate with cum laude honors and his 3.625 GPA this fall is magna cum laude-caliber. The fact that he was able to get on the Law Review by the force of his writing competition entry only solidifies this impression. Zach will bring substantial talent to your chambers.
Getting to know Zach as his First Generation mentor has also been a pleasure and makes me even more confident about his application. He is the first person in his family to go to professional school, so we have gotten together over coffee a number of times to talk about approaches to classes, summer jobs, and long-term career plans. I have truly enjoyed getting to know Zach and I am excited about his career. He has a passion for ideas both big and small—ranging from big picture questions of political and constitutional theory down to the nitty gritty of legal doctrine or regulatory policy. He is one of the few students I have met who is just as willing to talk about Tocqueville as he to dive into the technicalities of, say, telecommunications or energy rulemaking procedure. I can see Zach becoming a counselor to a commissioner at an independent agency or working at the solicitor's office at an agency before moving on to broader policy roles. Indeed, he is one of the few 2Ls I know this year who has shown no interest in law firm jobs and wants only to do public interest work this summer. That said, he also has a wide range of legal interests. I suspect he was appointed to run the Notre Dame Law Review articles committee because of his love of—and breadth of knowledge about—the law.

Zach's likely career trajectory toward public service and public affairs heartens me. He is eminently just the kind of person you want in government service. Zach is kind, humble, diligent, thoughtful, and quietly funny. Based on his interactions with the eight students my family hosted for Thanksgiving last fall, it's also clear that he plays well with others and has the respect of his peers. He will be great in chambers and in the courthouse: a faithful and diligent agent for his judge and a team player with his co-clerk(s).

Thank you for considering his application. If you have any questions or need to talk further, please contact me at pojanowski@nd.edu or 574.339.3624

Yours,

Jeffrey A. Pojanowski
Professor of Law
Notre Dame Law School

David P. Waddilove, J.D., Ph.D.
University of Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, IN 46556

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Zach first stood out in Property. In fact, I believe that he was the first student I truly noticed in his year. In the midst of this large 1L class, here was a student with a striking analytical capacity and principled consistency. He became my go-to to illustrate a vitally important concept of law: precedent. Zach's appreciation for what the law requires respecting authority made him a splendid interlocutor. The key was Zach's competence in principled reasoning – something I consider perhaps the greatest characteristic of a lawyer, which made him, from the beginning, illustrative of how to do law well.

This led me to offer Zach a position as my research assistant for the following summer. I didn't need Zach to apply; I just offered on the basis of what I'd observed. He proved to be a diligent and effective researcher, summarizing much of the vast over-supply of academic literature that I needed to consider, arranging outlines of topics, and drafting first cuts at sections for various articles. One of Zach's particular strengths, it turns out, is writing. He has an entertaining but learned and clear style that conveys information effectively and effortlessly. This is, I suspect, one of the things that you will find most useful about him as a clerk. And let me assure you as a teacher that writing ability is in increasingly short supply. So to find a potential clerk of Zach's strengths in this realm is something to be seized. Combined with his research skills, as exemplified in the rest of the work he did for me, I know that you will have an ideal clerk.

It has taken a bit of time for Zach's strengths to coalesce into good grades in law school, but that should not put you off. It is not uncommon for students of real ability to require time to transition to the peculiarities of the law school system. This is no reflection of capacities or future potential. In fact, some of the best lawyers and clerks are those with special strengths in research and writing, which I have observed to have a relatively poor correlation with test-taking skills. Yet exams are the near-exclusive basis of law school grades. So Zach's early grades are best discounted. The better indication of his abilities is the trend in his grades. This is unambiguous. Each semester he has improved and is now getting very good grades. I expect the trend to continue.

The only possible interruption in Zach's GPA progress could come from his non-class work. The first part of that is with the Notre Dame Law Review. Having successfully "written on" to the law review, as is fitting for his skill set, he narrowly failed to be editor-in-chief. Instead, he has become the head of articles, no small position. Indeed, article selection is now ultimately his responsibility, a daunting task even as I consider it. Zach has come to me seeking advice on article selection, and I know that he is taking his job extremely seriously. This is Zach's modus operandi, to work hard at the job in front of him, seriously and diligently, in an exemplary fashion. I'm sure you'll find that in your chambers as well, to the benefit of your judicial endeavors. The second part is my fault, as I asked Zach, given his excellent research assistance on property topics, following his excellent performance in Property class (his grade was just the final exam, which I take cum grano salis), to serve as a teaching assistant for me in Property for the spring 2023 semester. Again, he approached this task with verve, much to the benefit of my other students, and I hope not to his own detriment. Either way, these activities and his approach to them demonstrate what will make Zach a superb clerk.

Finally, you'll find that Zach is a splendid person who is always a pleasure to interact with and discuss things with. He has a pleasant personality, a dry wit, and a quick mind that makes him a delight to be around. I know from my own clerking experience for Judge Morris Arnold of the Eight Circuit, now a friend of longstanding with whom I had a long telephone conversation, how helpful it is when personal affinity can accompany professional comity. I'm sure you'll have that with Zach.

In sum, it I my great pleasure to recommend Zachary Damir to you as a law clerk. You will do yourself a great service by hiring him.

Sincerely,

David P. Waddilove, J.D., Ph.D.
Associate Professor of Law
Notre Dame Law School

David Waddilove - dwaddilo@nd.edu

Zachary A. Damir

Writing Sample

This writing sample is an unedited draft for a Note written for publication by the *Notre Dame Law Review*. It examines the use of punctuation marks to determine legislative intent. In particular, the Note focuses on parentheses, which have been a subject of debate in recent decisions. It concludes that a new syntactic canon of construction should be adopted. That canon would resolve ambiguity arising from statutory parentheses.

DISFAVORING STATUTORY PARENTHESES (EXCEPT IN CERTAIN CIRCUMSTANCES)

INTRODUCTION

A pair of parentheses can mean the difference in Medicare benefits,[1] regulatory exemptions,[2] court jurisdiction,[3] and possibly anything else governed by a statute with a parenthesis. Legislatures often use parentheses to separate provisions,[4] and even their absence has consequences. As one circuit court judge wrote, imitating an oft-cited quote in *O'Connor v. Oakhurst Dairy*,[5] "[f]or want of a pair of parentheses, we have a case."[6] Statutes and litigation regarding this punctuation mark are increasingly important. Four Supreme Court cases have discussed them in the last couple Terms.[7] They are not going away either, given the large number of parentheses in state and federal law.[8]

Despite its large presence in the legal world, there has been absolutely no scholarship expressly discussing the parenthesis and its bearing in statutory interpretation. This is a shame because the parenthesis has a unique place in legal history compared to its fellow punctuation marks, and it has a similarly nuanced role today. It is also deserving of study because it faces a decline born of a misunderstanding regarding its functions.

The parenthesis should be placed in the proper context, and this writing does that grammatically, historically, and legally. They have been used by courts and legislatures alike for hundreds of years. On that subject, this Note contributes to existing literature by proving an inverse relationship between the history of legal punctuation and the history of parentheses in legal documents.

In recent years, however, there have been warnings against their continued use due to ambiguous sentences and directives they create.[9] Court decisions mirror the concern by explicitly disfavoring parentheses and the material they contain. While this is often the right decision, the trend is based partly on a mistaken belief in the parentheses' use and ignores the important variety of functions they serve. Justice O'Connor once wrote that there is "no generally accepted canon of statutory construction favoring language outside of parentheses to language within them, nor do I think it wise for the Court to adopt one . . . ."[10] This Note takes the opposite view: a canon of construction against parentheses is certainly necessary, but it should not reflect the overzealous nature of the current trend. It should disfavor many parentheses, but permit others based on their intended usage. Accounting for distinctions would better respect the grammatical realities and contrary precedents on the ground.

---

[1] *See* Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022).
[2] *See* Chickasaw Nation v. United States, 534 U.S. 84 (2001).
[3] *See* Boechler v. Commissioner, 142 S. Ct. 1493 (2022); Biden v. Texas, 142 S. Ct. 2528, 2538 (2022).
[4] *See infra* notes 134–37 and accompanying text.
[5] 851 F.3d 69, 69 (2017) ("For want of a comma, we have this case.").
[6] Howard v. Mercer Transp. Co., Inc., 566 Fed. Appx. 459, 460 (6th Cir. 2014).
[7] *See infra* Part IIIA (discussing those cases).
[8] *See infra* notes 108, 112 & 115 (providing some short lists of statutes with parentheses).
[9] *See infra* notes 138–44 and accompanying text.
[10] 534 U.S. at 98 (O'Connor, J., dissenting).

The Note continues as follows: Part I will cover the story of punctuation in legal documents, from the early British statutes to the current textualist methodology. Part II will describe three important ways parentheses are used in modern statutes and demonstrate that they have a strong backing in legal history. Part III traces a general aura of distrust regarding parentheses in the court system, but explains that not all statutory parentheses have been condemned as immaterial. Finally, Part IV synthesizes the other parts to make the case for a new canon of construction specifically dealing with the parenthesis. It concludes that courts wishing to adopt a historically and grammatically faithful view of parentheses should adopt this canon: a statement in parentheses should be discounted when it conflicts with the rest of the text, but an exception or definition in parentheses should not be discounted.

Before beginning, a few clarifications are in order: First, "parentheticals" are mentioned throughout this paper. This should not be taken to mean a parenthetical phrase, which can be separated from a sentence with various punctuation. In these pages, a "parenthetical" instead means words appearing inside parentheses (this phrase, for instance, is considered a parenthetical). Second, this discussion does not opine on the use of parentheses to denote section numbers, citations, and the like. It concerns only operative words within a legal text. Finally, this Note only deals with parentheses in really hard cases, where the parenthetical or the words therein indicate an intent that might be at odds with the rest of the statute or a single, important provision. There are many benign parentheses out there, and they should not be disfavored due to this analysis and proposal.

I. PUNCTUATION AND STATUTORY INTERPRETATION

Punctuation marks—commas, hyphens, dashes, quotation and exclamation marks, periods, colons, semicolons, brackets, ellipses, and parentheses—play an important role in the English language.[11] They tell a reader how to read complex sentences that may otherwise be confusing or ambiguous.[12] It follows that punctuation marks could be used to clarify complex sentences in statutes. While it is true that the issue before a court is not often solely about punctuation marks,[13] they play a role in statutory interpretation. This is because without punctuation, "a reader might [punctuate] for you, in places you never wanted it."[14] It might even be an interpreter's "manifesto to master even the most oblique, obscure, conventions and designations of the existing system of punctuation."[15] Yet there was a long tradition that prevented the consideration of punctuation in statutory interpretation. This Part will review that tradition and its decline, showing that it should hold no sway over contemporary judges. Punctuation indicates meaning and intent just as much as words do.

---

[11] UNIV. OF LYNCHBURG, *A Quick Guide to Punctuation* (2022), https://www.lynchburg.edu/academics/writing-center/wilmer-writing-center-online-writing-lab/grammar/a-quick-guide-to-punctuation/.

[12] *See* John Yong & Design Taxi, *10 Hilarious Examples that Prove Punctuation Makes a Huge Difference*, BUS. INSIDER (Apr. 13, 2015), https://www.businessinsider.com/why-punctuation-matters-2015-4; BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 3 (2006) ("Punctuation marks are like traffic signs that guide readers through sentences."). *See generally* KARINA LAW, LET'S EAT GRANDMA! A LIFE-SAVING GUIDE TO GRAMMAR AND PUNCTUATION (2017).

[13] *See* Lance Phillip Timbreza, *The Elusive Comma: The Proper Role of Punctuation in Statutory Interpretation*, 24 QLR 63, 66 (2005).

[14] DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 57 (1982).

[15] LENNÉ EIDSON ESPENCHIED, THE GRAMMAR AND WRITING HANDBOOK FOR LAWYERS 80 (2011).

A. TRADITIONAL NOTIONS OF DISMISSAL

The long-standing practice of courts has been to dismiss punctuation marks in statutory text. This was partly born from the belief that early English statutes did not have punctuation marks and thus should not be considered when added later on.[16] That belief is not true. Punctuation has appeared in the Statutes of the Realm "from the earliest days," for "the statutes were intended primarily as a written record, and generally—only incidentally for oral delivery."[17] However, there was a valid concern about how punctuation was inserted into the statutes.

Originally, marks were inserted into written works to indicate pauses for a reader.[18] Those marks were not standardized, and could range from "heavily punctuated with apparent care" to "completely without punctuation."[19] Later on, British law was enacted and transcribed by scriveners[20] and printers,[21] who punctuated "[i]f there was a compelling reason for punctuation."[22] So, using their own determinations, these aides and publishers might alter the phrasing of law. Naturally, this was a problem, for those post facto punctuators were not elected members of Parliament.[23] And one version of a statute could be published in more than one way. More worrisome was that "[w]hat passed for a statute in court might or might not be the original and frequently was not even an accurate copy."[24] The argument goes that printers' and scriveners' views of proper punctuation should not bind English subjects to an unintended meaning. That argument is correct.

And so it was ruled. In *Barrow v. Wadkin*,[25] the issue was whether a statute read "*aliens,* duties, customs, and impositions," or "*aliens'* duties, customs, and impositions."[26] Did the statute refer to aliens or their duties? One edition of the statute read the first way and another favored the second way.[27] After the original draft of the statute provided no help, the Master of the Rolls declared that "in the Rolls of Parliament the words are never punctuated" and went on to determine

---

[16] *See, e.g.*, David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 705 (2012); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 307 (1891); E.E. BROSSARD, PUNCTUATION OF STATUTES 4 (1938).

[17] DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 159 (1963); Richard C. Wydick, *Should Lawyers Punctuate?*, 1 SCRIBES J. LEGAL WRITING 7, 17–19 (1990 (crediting Mellinkoff with discrediting this theory); *see also* Statute made at Northampton 1328, 2 Edw. 3 c. 2–7 (Eng.) (displaying clear commas, semicolons, and other punctuation). Further, Professors Wydick and Mellinkoff have examined handwritten statutes and discovered marks resembling punctuation. Wydick, *supra*, at 18 n.43. This demonstrates that printed and original acts have marks indicating punctuation. In fact, William the Conqueror's *Domesday Book* is "heavily dotted" with punctuation. MELLINKOFF, *supra*, at 159 ("From William's day on to the introduction of printing in England . . . it is possible to trace through legal writings . . . the same developments in punctuation [as in nonlegal writing].").

[18] MELLINKOFF, *supra* note 17, at 152–53.

[19] *Id.*

[20] BARBARA M.H. STRANG, THE HISTORY OF ENGLISH 107–10 (1970); *see also* James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1541 (2001) (describing those editors as "clerks and compliers").

[21] MELLINKOFF, *supra* note 17, at 163; LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 103 (2013).

[22] MELLINKOFF, *supra* note 17, at 161.

[23] *See* SUTHERLAND, *supra* note 16, at 307 ("[W]hen bills are not printed and furnished in their perfected form to members of the legislative body . . . the punctuation . . . does not receive the attention of individual legislators . . . .").

[24] MELLINKOFF, *supra* note 17, at 162.

[25] Barrow v. Wadkin [1857] 53 Eng. Rep. 384 (Rolls Court).

[26] *Id.* at 385 (emphasis added).

[27] *Id.*

the case using the "spirit and object of the act."[28] Although the statute's punctuation was the primary issue, the court did not decide whether the mark was an apostrophe or comma. Instead, the court disfavored punctuation altogether and inadvertently began a canon based on a falsehood.[29] This punctuation should have been discarded, not because the "words are never punctuated," but because of the dueling versions.

In 1917, however, the King's Bench reexamined the presumption about early statutes and punctuation. As it was written, the Treason Act of 1351 punishes any man who would "be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere . . . ."[30] Sir Roger Casement was one such man, convicted of conspiring with the Germans, while in Germany, to smuggle weapons into Ireland to be used for a revolution.[31] Casement's lawyer said that because statutes were not punctuated, the crime was limited to treason committed *inside the King's realm only*.[32] The Crown, however, argued that parentheses were inserted around "giving to them Aid and Comfort in the Realm" such that the statute also applied to subjects committing treason *outside the realm*.[33] In determining this case on appeal, Judge Darling closely examined the original Treason Act with a literal magnifying glass and commented that there "may not be brackets, but there is a very distinct line drawn right through the line of writing . . . where we should now perhaps . . . put breaks in the print."[34] And Judge Atkins replied that "they really are to represent commas; they are reproduced in the reprint of the Statue as commas. The Statute Roll is reprinted exactly correctly."[35] While Casement's lawyer responded that the ambiguity should favor the defendant,[36] Casement was eventually "hanged by a comma."[37] Though only one of the reasons why Casement's conviction was affirmed, this discussion casts strong doubt on the presumptions made in *Barrow* and its progeny concerning punctuation. But since *Casement* was decided in the 1900s instead of the early English period, it became the common view that punctuation "lack[s] the legal status of words" because the Rolls were not

[28] *Id.* Aside from the statute he examined for this case, the Master of the Rolls cited no support bolstering his broad statement about statutes and punctuation.
[29] *See* CONG. RSCH. SERV., STATUTORY INTERPRETATION AND RECENT TRENDS 11 (2014) (describing how an English rule established that punctuation was not part of a statute in early cases); MELLINKOFF, *supra* note 17, at 163; note 17, *supra*.
[30] Treason Act 1351, 25 Edw. 3 Stat. 5 c. 2 (Eng.).
[31] R v. Casement [1917] 1 K.B. 98, 99–103.
[32] *Id.* at 113 ("The meaning of that statute, as of all statutes, is to be derived from the words read in their natural sense unelucidated or unobscured by the counsel of commentators however eminent. The words are 'be adherent . . . within the realm.' No authority short of a judgment can compel this Court to say that those words mean 'be adherent . . . without the realm.'").
[33] MELLINKOFF, *supra* note 17, at 168.
[34] *Id.* at 169 (quoting R v. Casement (1917), 86 L.J.K.B. 482, 486 (C.A. 1916).
[35] *Id.*
[36] *Id.*
[37] *See* Seosamh Gráinséir, *Irish Legal Heritage: Hanged by a Comma*, IRISH LEGAL NEWS (Sept. 10, 2018), https://www.irishlegal.com/articles/irish-legal-heritage-hanged-by-a-comma; *see also* Mark Anderson, *Hanged on a Comma: Drafting Can Be a Matter of Life and Death*, IP DRAUGHTS (Oct. 14, 2013), https://ipdraughts.wordpress.com/2013/10/14/hanged-on-a-comma-drafting-can-be-a-matter-of-life-and-death/. However, there were other arguments put forth during the trial, especially given the uncertainty regarding the mark, and this discussion of language did not make it into the final opinion. *See* Dennis Baron, *Commas Don't Kill People*, THE WEB OF LANGUAGE (July 23, 2019, 3:45 PM), https://blogs.illinois.edu/view/25/801468 (arguing that the context matters when deciding whether to kill by grammar); MELLINKOFF, *supra* note 17, at 170.

punctuated, not because they were undemocratically included.[38] Hundreds of years later, there remains a legacy of lackluster legal punctuation in England.[39]

B. THE AMERICAN COMPROMISE

The early American legal community departed from the aforementioned early British model in some ways while still retaining a wariness towards punctation. From the start, drafters like Thomas Jefferson and John Adams grew to dislike the "long sentence" that was indicative of the British statute.[40] Jefferson wrote that such statutes are "really rendered more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves."[41] As a whole, however, writers in the Founding Era were perceived not to "care" about punctuation.[42]

The drafters of the Constitution of the United States depart from this perception. The original Constitution features 140 periods, nine dashes, five sets of parentheses, 375 commas, 65 semicolons, ten colons and em-dashes, and one set of quotation marks.[43] And they matter, for one semicolon could drastically change the meaning of a provision.[44] The idea that "the Framers paid attention to seemingly small matters of interpretation" and were "contentious draftsmen who generally paid attention to fine distinctions"[45] is bolstered by the activities of the Committee of Style. Formed during the Constitutional Convention, the Committee was tasked to "revise the stile [sic] of and arrange the articles which had been agreed to by the [Convention]"[46] so as to create a cleaner and more presentable final product.[47] This necessarily included the punctuation of the Constitution.[48] Gouverneur Morris, the Committee's principle draftsman and possibly a "dishonest scrivener," attempted to change the meaning of the General Welfare Clause by

---

[38] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 258 (2000). Note that the original Roll in the *Casement* case did have indications of punctuation, which that Court thought were "correctly" transferred to the reproductions of the statute. *Id.* at 169 (quoting R. v. Casement (1917), 86 L.J.K.B. 482, 486 (C.A. 1916)).

[39] *See* RONALD L. GOLDFARB & JAMES C. RAYMOND, CLEAR UNDERSTANDINGS: A GUIDE TO LEGAL WRITING 46–47 (1982) (comparing a British contract to an American one, and saying that the British one "[made] do without any punctuation at all" due a different cultural understanding).

[40] MELLINKOFF, *supra* note 17, at 252.

[41] *Id.* at 253 (quoting 1 THE WRITINGS OF THOMAS JEFFERSON 65 (Lipscomb, ed. 1905)).

[42] *See, e.g.*, *id.* at 250.

[43] *See* Vesan Kesavan & Michael Stokes Paulsen, *Is West Virginia Constitutional?*, 90 CALIF. L. REV. 291, 334 (2002); Yellin, *supra* note 16, at 718.

[44] For possible implications and interpretations of certain semicolons, see generally Michael Nardella, Note, *Knowing When to Stop: Is the Punctuation in the Constitution Based on Sound or Sense?*, 59 FLA. L. REV. 667 (2007); Kesavan & Paulsen, *supra* note 34.

[45] Kesavan & Paulsen, *supra* note 43, at 337.

[46] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 553 (Max Ferrand, ed. 1966).

[47] For instance, the Committee turned twenty-seven approved articles into the seven articles of the original Constitution. John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 145, 171 (2006). There is an ongoing debate concerning the differences between the Committee draft and the one voted on by the Convention, which this Note does not opine on. *See* William Traenor, *Academic Highlight: The Framers' Intent: Gouverneur Morris, the Committee of Style and the Creation of the Federalist Constitution*, SCOTUSBLOG (Aug. 5, 2019, 10:08 AM), https://www.scotusblog.com/2019/08/the-framers-intent-gouverneur-morris-the-committee-of-style-and-the-creation-of-the-federalist-constitution/; David S. Schwartz, *The Committee of Style and the Federalist Constitution*, 70 BUFF. L. REV. 781, 791 (2022).

[48] Famously, for example, the Committee changed "We the people of the States," which was then followed by a list of the states, to "We the People, of the United States." Vile, *supra* note 47, at 172; Schwartz, *supra* note 47, at 789.

changing a comma to a semicolon,[49] and succeeded in changing a comma to a semicolon in Article IV Section 3.[50] While the first version creates new states with the approval of the state's legislature and Congress, the Committee's version disallows the creation of states by partitioning other states.[51] This discussion highlights the work one punctuation mark can do in interpretive work and demonstrates that officials were aware of these marks. Indeed, the Committee of Style had three days to approve the new draft.[52] But despite the valued role of punctuation in constitutional drafting, the early American courts primarily clung to the British convention when examining statutes.

This analysis starts with Chief Justice John Marshall. Riding circuit in 1828, the Chief Justice presided over *Black v. Scott*, a case concerning a statute requiring that "[t]he estate of a guardian or curator, appointed under this act . . . shall be liable for whatever may be due from him or her . . . ."[53] Read this way, with the comma inserted after "curator," the liability would attach to both guardians *and* curators. The statute, however, was interpreted to mean the opposite. The Chief Justice wrote:

> [I]n the printed code, the comma is place[d] after the word, "curator," so as to connect the guardian with the curator, and apply the [subsequent] words equally to both. I am, however, aware, that not much stress is to be laid on this circumstance; and that *the construction of a sentence in a legislative act does not depend on its pointing*. The legislature can scarcely be supposed to have intended to distinguish between remedies for debts from testamentary and statutory guardians, and I am, therefore, disposed to read the act with the comma after the word "guardian."[54]

In essence, the Chief Justice explicitly discarded a comma to rewrite the statute and disconnect "curator" from "guardian." This might be permissible in a context in which outside scriveners and printers controlled punctuation, but that was no longer the case. As demonstrated above,

---

[49] *See, e.g.*, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 379; William Michael Traenor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 5 (2021). This change would have "convert[ed] a limitation on the taxing authority into a broad positive grant of power." *Id.*

[50] *See id.* at 98–102; Traenor, *supra* note 49. Morris did much more than change punctuation. In fact, he added the words "herein granted" to the Vesting Clause in Article I, but not in Article II. Traenor, *supra* note 49, at 59–67. This difference would later serve as the basis for decisions involving executive removal power, among other important subjects. *See, e.g.*, United States v. Myers, 272 U.S. 52, 138 (1926). For more examples contrasting the Convention proceedings and the Committee of Style drafts, see William Michael Traenor, *Taking the Text Too Seriously: Modern Textualism, Original Meaning, and the case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 507–08 (2007) and see generally Traenor, *supra* note 49.

[51] Traenor, *supra* note 49, at 99–100; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 37, at 454–55; U.S. CONST. Art. IV. § 3 cl. 1. "A literal reading of Morris's text would have barred the admission of the slave state of Kentucky . . . and Tennessee." Traenor, *supra* note 49, at 100. See generally Kesavan & Paulsen, *supra* note 43 for the application of this reading to West Virginia.

[52] Schwartz, *supra* note 47, at 783; 5 THE PAPERS OF GEORGE WASHINGTON, CONFEDERATION SERIES 324 (W.W. Abbott & Dorothy Twohig, eds., 1997). There may be worthwhile objections concerning the role of "printers and engrossers" in the distributed Constitution, Schwartz, *supra* note 47, at 788 n.15, but the fact still remains that founders like Morris and his Committee toiled over and changed punctuation marks, and that those changes were eventually approved.

[53] Black v. Scott, 3 F. Cas. 507, 508 (Marshall, Circuit Justice, C.C.D. Va. 1828) (No. 1,464).

[54] *Id.* at 510 (emphasis added). *But see* Pfander, *supra* note 20 at 1549, for an account suggesting that Marshall heeded the punctuation of the Judiciary Act of 1789 when deciding *Marbury*.

legislators at this time were aware of the effects of punctuation marks,[55] and it was "presumed that the writer intended to be understood according to the grammatical purposes of the language he has employed," and even if read aloud before passage, it was assumed "that the principal points [were] observed in the reading."[56] In other words, the Legislatures had no excuse to ignore punctuation since the final printed punctuation was the same as in the final statute. The judicial standard, however, became "habitual" in following the British tradition of neglecting punctuation,[57] even while other "American men of letters experimented with nuances in literary fashion."[58]

While the British approach was still dominant, it was showing cracks in its foundation. In 1837, the Supreme Court declared in *Ewing's Lessee v. Burnet*[59] that "[p]unctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners." To the Court's credit, *Ewing's Lessee* was a step taken in the right direction. Instead of a blanket statement against the consideration of punctuation, it was said that it may be used when all other means fail.[60] This was the beginning of the end for the early English approach, but it was not gone yet. In deciding a contract case, for instance, the Eighth Circuit, citing *Ewing's Lessee*, said that "[p]unctuation is no part of the English language" and that "it is always subordinate to the text, and is never allowed to control its meaning."[61] Though the circuit court case was about a contract and not a statute, it demonstrated that the legal community was not yet ready to let go of the British approach.

This uncertain trend continued into the 20th century. At first, the Supreme Court stuck with *Ewing's Lessee*. In *Barrett v. Van Pelt*, a case decided in 1925, the Court said that "[p]unctuation is a minor, and not a controlling element in interpretation, and courts will disregard the punctuation of a statute, or repunctuate it, if need be to give effect to what otherwise appears to be its purpose and true meaning."[62] In this reading, like in *Ewing's Lessee*, punctuation mattered, but only in very narrow circumstances; where all other methods fail. Using this standard, it was unlikely for punctuation to be considered seriously given that it could be changed to conform with subjective views concerning the "purpose" of a statute. It still, however, allowed for more consideration than was previously given.

But then, in *United States v. Shreveport Grain and Elevator Company*,[63] the Court laid down a broad rule: "[p]unctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed."[64] The tension between *Shreveport* and *Ewing's Lessee* was evident in legal guides at that time. While some guides said that "when the intention of the statute and the punctuation thereof are in conflict, the former must

---

[55] *See* notes X–X and accompanying text.
[56] SUTHERLAND, *supra* note 16, at 307.
[57] MELLINKOFF, *supra* note 17, at 250.
[58] *Id.* at 252.
[59] Ewing's Lessee v. Burnet, 36 U.S. (11 Pet.) 41 (1837).
[60] To be sure, it is not a large step in the right direction. After all, punctuation is more clearly within the "four corners" of a statute than the legislature's purpose is.
[61] Holmes v. Phoenix Ins. Co. of Brooklyn, 98 F. 240, 241–42 (8th Cir. 1899).
[62] Barrett v. Van Pelt, 268 U.S. 85, 91 (1925).
[63] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932).
[64] *Id.* at 85; *see also* Costanzo v. Tillinghast, 287 U.S. 341, 344 (1932) ("It has often been said that punctuation is not decisive of the construction of a statute. . . . Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent.") (citations omitted).

control,"[65] others said that punctuation "may afford some indication of [intent], even decide it."[66] The two perspectives even became one of Karl Llewellyn's famous pairs of opposing canons of construction.[67]

In summation, the early American period had created a compromise between the British tradition banning punctuation in interpretation and the understanding that such a strict rule was becoming less tenable.[68] Where there was once a no-tolerance policy, an "emergency only" option was introduced through *Ewing's Lessee*. Though *Shreveport* tried to claw that exception back, the view that "[p]unctuating is interpreting"[69] became increasingly popular. But it was not until the textualist renaissance that punctuation got the full interpretive credit it deserved.

C. TEXTUALISM AND PUNCTUATION'S REDEMPTION

The judicial philosophy of textualism openly favors the punctuation of a statute over the legal traditions described above. Popularized by Judge Easterbrook and Justice Scalia in the 1980s and 90s, textualists generally hold that the text of a statute governs its interpretation since the legislature voted and compromised for that text, not the statute's supposed purpose(s).[70] As Justice Scalia wrote, "[t]he text is the law, and it is the text that must be observed."[71] This philosophy remains dominant today[72] and incorporates punctuation into the interpretive calculation.

---

[65] EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 199 (1940); *see also, e.g.*, ARTHUR LEMHOFF, COMMENTS, CASES, AND OTHER MATERIALS ON LEGISLATION 579 (1949) ("Punctuation is no part of an act."); BROSSARD, *supra* note 16, at 10, 23 ("It would be simpler and better to make no pretense of depending upon punctuation . . . ."). The British method, meanwhile, predictably falls into this camp. *See* EDWARD BEAL, CARDINAL RULES OF LEGAL INTERPRETATION 301 (A.E. Randall, ed., 1924) (Eng.).

[66] SUTHERLAND, *supra* note 16, at 308; *see also, e.g.*, FRANCES J. MCCAFFREY, STATUTORY CONSTRUCTION §§ 22–26 (1953) ("More and more, judges are giving consideration to the marks of punctuation . . . ."); United States v. Marshall Field & Co., 18 C.C.P.A. 228 (1930) ("[M]arks do have their place in ascertaining the meaning of language."). One draftsman of the Illinois constitution wrote that punctuation in legal documents would depend on how masculine they are and how they contribute to the "rugged and bold" search for meaning to which only words may contribute. Urban A. Lavery, *Punctuation in the Law*, 9 AM. BAR ASS'N J. 225, 225, 227–28 (1924).

[67] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be* Construed, 3 VAND. L. REV. 395, 401, 405 (1950) (The "thrust[ing]" canon is that "Punctuation will govern when a statute is open to two constructions" and the "parry[ing]" canon is that "Punctuation marks will not control the plain and evident meaning of language.").

[68] *See* MELLINKOFF, *supra* note 17, at 368 ("The tug of the past is so strong that few courts will come right out and confess that the traditional snobbery toward punctuation has made a mess of legal writing. Instead we are treated to exercises in gamesmanship demonstrating how to ignore punctuation while really using it."). And the drafters at the Constitutional Convention would likely not have worried about punctuation if it did not matter. Instead, they formed and examined the work of the Committee of Style, further indicating that there was a baseline understanding that the British tradition was not a realistic blueprint. *See supra* notes 46–52 and accompanying text.

[69] BROSSARD, *supra* note 16, at 23 ("[H]e who points a statute thereby puts his construction upon it.").

[70] *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73–74 (2006); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 351–57 (2005); Caroline Bermeo Newcombe, *Textualism: Definition, and 20 Reasons Why Textualism is Preferrable to Other Methods of Statutory Interpretation*, 87 MO. L. REV. 139, 142–47 (2022). This Note does not delve into the role of punctuation in opposing schools of statutory interpretation given the dominance of textualism in today's judiciary.

[71] Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann, ed., 1997).

[72] *See, e.g.*, Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg ("We are all textualists now."); Adam J. White, Opinion, *Judge Ketanji Brown Jackson May Have Set a New Standard for Future*

Statutory punctuation, in this context, is necessarily scrutinized because it is presumed that "Congress follows ordinary rules of punctuation and that the placement of every punctation mark is potentially significant."[73] "Indeed," say Professors Manning and Stephenson, "as the textualist influence in the judiciary has grown, courts have not hesitated to emphasize rules of grammar and proper punctuation in determining the meaning of legislation, treating those elements of a statute's 'plain meaning.'"[74] And Justice Scalia and Bryan A. Garner said that "[n]o intelligent construction of a text can ignore its punctuation" because "while [it] will rarely change the meaning of a word, . . . it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part."[75] No matter how punctuation ends up affecting the meaning of a statute, however, textualist philosophy has changed the landscape, for it became apparent that "the modern trend is for judges to be willing to take punctuation into account."[76] Both the British tradition dismissing punctuation marks and the early American "emergencies only" compromise are thus dead in the age of textualism.[77]

The death certificate was handed down by the Supreme Court itself[78] when it said that the "meaning of a statute will typically heed the commands of its punctuation."[79] A classic case illustrating the importance of punctuation in the textualist renaissance is *United States v. Ron Pair Enterprises, Inc*.[80] That case dealt with Section 506(b) of the Bankruptcy Code, which "allows a

---

Nominees, CNN (Mar. 24, 2022), https://www.cnn.com/2022/03/24/opinions/scotus-hearing-jackson-new-precedent-white/index.html; Anita Krishnakumar, *Academic Highlight:* Hyatt *is Latest Example of Textualist-Originalist Justices' Willingness to Overturn Precedent*, SCOTUSBLOG (May 24, 2019, 10:20 AM), https://www.scotusblog.com/2019/05/academic-highlight-hyatt-is-latest-example-of-textualist-originalist-justices-willingness-to-overturn-precedent/ (placing Justices on a textualist "spectrum").

[73] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990).

[74] JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 182 (2021) (citing Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 80 (1991) and then United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–42 (1989), each of which deal with the interpretation of a comma). Professors Manning and Stephenson also suggest that cases "minimizing punctuation" might be products of "an era in which the Court paid less attention to the semantic import of the statutory text." *Id.* at 183. Finally, they deny the *Ewing's Lessee* standard, saying that punctuation should not just be used when other means fail, but in all cases, since "the body of a legal instrument cannot be found to have a 'clear meaning' without taking into account its punctuation." *Id.* at 162.

[75] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 161 (2012). They also cite incidents where punctuation has cost governments millions. *Id.* at 162–64.

[76] JIM EVANS, STATUTORY INTERPRETATION: PROBLEMS OF COMMUNICATION 276–77 (1988) ("There is no good reason at all why punctuation should be ignored . . . ."). In a mirror image of the *Casement* case, for example, Judge Chasanow of Maryland spared a killer of a death sentence for want of a comma. *See* John Fienstein, *Archard Girl's Slayer Gets Life Term*, WASH. POST (May 16, 1979), https://www.washingtonpost.com/archive/local/1979/05/16/archard-girls-slayer-gets-life-term/f84c93f8-abe1-4da6-940c-3787938950aa/.

[77] *See* SCALIA & GARNER, *supra* note 75, at 161–62. Contract law somewhat follows this textualist trend. *See* Mark Cooney, *Style is Substance: Collected Cases Showing Why It Matters*, 14 SCRIBES J. LEGAL WRITING 1, 44 (2011–2012) (citing Favell v. United States, 16 Cl. Ct. 700, 722 (1989) and then Davis v. Pletcher, 727 S.W.2d 29, 33 (Tex. App. 1987)). *But see* Banco Espirito Santo v. Concessionaria Do Rodoanel Oeste S.A., 951 N.Y.S.2d 19, 26 (N.Y. App. Div. 2012) ("Punctuation is always subordinate to the text and is never allowed to control its meaning."). This tension makes more sense in contract law, where the intention between the contracting parties is probably easier to discern than the intentions and purposes of an entire representative legislature. In any event, this Note's thesis regarding punctuation and parentheses is limited to *statutory* interpretation.

[78] The lower courts, however, also helped lay the past doctrine to rest. *See* O'Connor v. Oakhurst Dairy, 851 F.3d 69 (2017) ("For want of a comma, we have this case.").

[79] Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1993).

[80] United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989).

holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, 'interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'"[81] Interpreting the statute, the Court found that the comma after "claim" separates the two types of recovery: the interest, and the fees, costs, or charges.[82] Thus, "the natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement."[83] Therefore, the interest was "unqualified."[84] Dissenting, Justice O'Connor cited early American cases and came to the conclusion that "the Court has not hesitated in the past to change or ignore the punctuation in legislation,"[85] but a victorious 5–4 textualist majority showed the Court was heading in a different direction. In their words, "the language and punctuation Congress used cannot be read in any other way."[86] Punctuation mattered, even though it was "contrary to conventional scholarly wisdom and the perceived 'intent' of Congress."[87] The drafting conventions took note and hammered the final nails into the coffins of *Ewing's Lessee* and the British tradition.[88] And so, the current rule regarding the interpretation of punctuation in statutes is generally that it must be considered.[89]

* * * * *

As this note moves into its discussion of parentheses, it is important to recall how courts have treated punctuation in the past. Since punctuation in statutes was generally discounted, cases involving the parenthesis rarely came before courts, even though this account is ultimately untrue with regard to the parenthesis.[90]

---

[81] *Id.* at 239–40 (quoting 11 U.S.C. § 506(b) (2018)).
[82] *Id.* at 241.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 250 (O'Connor, J, dissenting). Justice O'Connor cited *Ewing's Lessee*, Costanzo v. Tillinghast, 287 U.S. 341, 344 (1932), and *Barrett v. Van Pelt* to make her case. *Ron Pair*, 489 U.S. at 250 (O'Connor, J., dissenting). Each of those cases fall under the "emergencies only" doctrine that became disfavored by the new textualist philosophy.
[86] *Id.* at 242 (majority opinion). Note that the majority was joined by textualist Justices Scalia, Kennedy, and Rehnquist.
[87] Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEVS. J. 289, 331–32 (1994) ("While one may believe that the interpretation of punctuation in Ron Pair led to an absurd result, this is not due to the absurdity of adherence to punctuation in interpretation.").
[88] *See e.g.*, GARNER, *supra* note 12, at 3; GOLDFARB & RAYMOND, *supra* note 39, at 42–45; REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING § 8.21 at 188 (1986); ESPENCHIED, *supra* note 15, at 80; EVANS, *supra* note 76, at 276–77; MANNING & STEPHENSON, *supra* note 74, at 182–83; NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 17:15 (2007).
[89] For a well-put summary, see Jack L. Landau, *Oregon Statutory Construction*, 97 OR. L. REV. 583, 670, 681 (2019), in which it is said that "courts generally assume that legislatures intend that statutes be read . . . consistent with . . . punctuation" and that "it is not at all uncommon for courts to ascribe dispositive significance to one punctuation mark."
[90] *See infra* Part IIB.

II. PARENTHESES AS A WRITING CHOICE

Part II focuses on the punctuation mark that gives this Note its title. While the parenthesis might seem like an "opaque"[91] and "incidental"[92] way to impart meaning into a statute, there is more to the story. This part begins by outlining the application of parentheses in normal English and will then consider them in the legal context. At the end of this examination, it is evident that parentheses can help determine the common English meaning of a text, but that the legal community tends to discount and disfavor them.

A. PARENTHESES' ROLE AS PUNCTUATION

The parenthesis was first seen in English writing in the 1300s and became popularized in the Elizabethan era.[93] Parentheses remain popular in poetry,[94] literature,[95] music,[96] and as we will soon see, statutory text[97] (with varying levels of success). The word comes from the Greek *parenthesis*, meaning "put in beside."[98] This makes sense since these punctuation marks separate certain words from the rest of the sentence in which they appear. Generally understood, the "purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition, or additional piece of information of any sort, into a sentence that is logically and grammatically complete without it."[99] It has also been asserted that the words inside the parenthetical are of "theoretically minor importance"[100] and that the marks therefore "deemphasize information" inside.[101]

---

[91] Becerra v. Empire Health Found., 142 S. Ct. 2354, 2365 (2022).
[92] GORDON LOBERGER & KATE SHOUP, WEBSTER'S NEW WORLD ENGLISH GRAMMAR HANDBOOK 170 (2002).
[93] *See* JOHN LENNARD, BUT I DIGRESS: THE EXPLOITATION OF PARENTHESES IN ENGLISH PRINTED VERSE (1991) (tracking the use of parentheses in the context of British poetic history).
[94] In this context, parentheses aid a writer who "wants to insert information into a passage that adds detail." Emma Baldwin, *Parenthesis*, POEM ANALYSIS (2022), https://poemanalysis.com/literary-device/parenthesis/. *See generally* Roi Tartakovsky, *E.E. Cumming's Parentheses: Punctuation as Poetic Device*, 43 STYLE 215 (2009) (delving into the reasons why E.E. Cummings might have used parentheses in his poems and how they add to poems generally); LENNARD, *supra* note 93.
[95] In this context, the parenthetical serves all the purposes it would in any other setting, except maybe statutory language.
[96] In this context, parentheses are used to augment a song title with familiar words so as to remind listeners of the most notable lyrics. There are so many examples of this that it would be possible to create a "parenthesis playlist" with them that would last multiple hours. For notable titles employing this purpose, *see, e.g.*, THE PROCLAIMERS, I'M GONNA BE (500 MILES) (Chrysalis 1988); THE ROLLING STONES, (I CAN'T GET NO) SATISFACTION (London, 1965); ABBA, GIMME! GIMME! GIMME! (A MAN AFTER MIDNIGHT) (Polar Music 1979). This purpose differs from the accepted legal use of parentheses since it seeks to emphasize certain memorable words instead of deemphasizing them.
[97] *See* Part IIB, *infra*.
[98] *Parenthesis*, ONLINE ETYMOLOGY DICTIONARY (2022), https://www.etymonline.com/word/parenthesis.
[99] ERNEST GOWERS, PLAIN WORDS: THEIR ABCS 283 (1955) (Eng.).
[100] H.W. FOWLER & F.G. FOWLER, THE KING'S ENGLISH 279 (1985) (first published 1906).
[101] THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE 281 (Andrea J. Sutcliffe, et al. eds., 1994). This guide goes on to say that dashes emphasize information and that commas indicate that a phrase is a part

The latter claim is too narrow. The information inside the parenthetical may be removed with no grammatical effect nor logical effect, but it does not follow that such removable information must be relatively unimportant. In fact, its inclusion in the sentence demonstrates that the parenthetical is "too important to either leave out entirely or to put in a footnote or an endnote."[102] And the context and the meaning of the outside words might still be changed by those inside the parentheses. For instance, consider the sentence, "It was a beautiful day in the forest (aside from the incoming logging company) and the woodland animals were frolicking." The removal of this parenthetical would not affect the logic or structure of the outside sentence, but it also previews deforestation and a problem for the animals. This changes the way the sentence is understood. In other words, "a parenthetical can add crucial new information to a sentence without disrupting the flow."[103] The line between important and unimportant parenthetical phrases might depend on the reason it is being used. The parenthesis has multiple uses,[104] and some might indicate more emphasis than others. Three usages are particularly relevant to the legal profession generally. They are described below:

First, parentheticals may be used to provide definitions.[105] For example, "The musician proudly displayed his doodlesack (bagpipes) to the partygoers." Without the parenthetical definition, that example would likely suggest inappropriate conduct to the modern reader, unless he somehow knew the meaning of "doodlesack." With the parentheses, the definition is provided and the reader's understanding of the sentence changed and clarified, and the sentence remains intact. While this might not be important to a defense of the parenthesis in regular writing since definitions remain obvious in most contexts and are thus superfluous parentheticals, they matter a great deal in statutes. When interpreting statutes, one generally looks to definitions as they "suggest that legislatures intended for a term to have a specific meaning that might differ in important ways from its common usage."[106] In other words, the definition of a statute might control its meaning, and so the format in which it is written must also matter. Most statutes include definitions,[107] and those definitions might be explicitly stated or referenced by a parenthetical.[108]

---

of the given sentence. *Id.* This spectrum more closely resembles Bryan A. Garner's view of the parenthesis. *See infra* note 141 (explaining the Garner view of parentheses).

[102] Julia L. McMillan, *Reasons to Use Parentheses*, WRITING COMMONS (2021), https://writingcommons.org/article/using-parentheses/.

[103] Nathaniel George, *Parenthetical Phrases*, UNIV. OF NEV., RENO (Sept. 29, 2020), https://www.unr.edu/writing-speaking-center/student-resources/writing-speaking-resources/parenthetical-phrases.

[104] *See, e.g.*, OXFORD ENG. DICTIONARY, *Parentheses* (2022), https://www-oed-com.proxy.library.nd.edu/view/Entry/137834?rskey=DayMNG&result=2#eid (describing parentheticals as "an explanation, afterthought, or aside"); Mark Nichol, *15 Purposes for Parentheses*, DAILY WRITING TIPS (May 4, 2011), https://www.dailywritingtips.com/15-purposes-for-parentheses/; McMillan, *supra* note 102 ("Since there are many reasons to use parentheses, be sure that the function of parentheses is always made clear to your readers.").

[105] *See, e.g.*, GOWERS, *supra* note 99, at 283.

[106] Katherine Clark & Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, GEORGETOWN UNIV. L. CTR. 2 (2017); *see also* Chris Micheli, *The Use of Definitions in Legislation*, CAL. GLOBE (Nov. 6, 2020), https://californiaglobe.com/articles/the-use-of-definitions-in-legislation/; GOV'T OF CAN., *Legistics Definitions* (Aug. 29, 2022), https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p5.html; Jeanne Frazier Price, *Wagging, Not Barking: Statutory Definitions*, 60 CLEVELAND STATE L. REV. 999, 1002–03 (2013) "([Statutory definitions] confer the authority and establish a structure that allows the statute's normative provisions to have effect; they inform and instruct as to how a particular outcome might be achieved or avoided").

[107] *Id.* at 1000.

[108] *E.g.*, 18 U.S.C. § 20 (2018); 6 U.S.C. § 1337a(d) (2018); 42 U.S.C. § 293*l*-1(f) (2018); ARK. CODE ANN. § 28-72-302(a) (2022); IND. CODE § 6-3.6-2-14 (2021); KAN. STAT. ANN. § 79-4605(1) (2022); KY. REV. STAT. ANN. § 368.355 (2022); LA. STAT. ANN. § 47:49 (2022); MASS. GEN. LAWS ANN. Ch. 68A §4 (2022); MINN. STAT.

Second, parentheticals may be used illustratively.[109] This can be done in two ways. The first places an explanatory phrase meant to clarify or contextualize inside a parenthetical, thereby modifying words outside the marks. This is a widely done practice in legal documents and regular writing. For instance, consider these sentences: "The queen and princess (having been brainwashed) demanded that the knight battle the nurse." and "The maps of Blackbeard and Davy Jones (locations of diamonds) are hidden in the Oval Office." Both parentheticals add information that enhances the rest of the sentence and can be removed without damaging the logic and structure of the sentence. The contextual information might still be important. Here, the fact that the royalty is brainwashed relieves them of some responsibility for the unfair duel, and that the maps are useful for only diamond hunting. But there are also degrees of ambiguity. For instance, is the princess the only one brainwashed and does Blackbeard's map lead to something other than diamonds? [110] One could use the "last antecedent rule"[111] to find a favored meaning, but either reading is plausible.

Another illustrative use involves the word "including" inside a parenthetical so as to elaborate what elements might be affected by a sentence. For instance, "The ghoulish attendants (including ghosts, banshees, horned beasts, and bunnies) are to be escorted to the river Styx." Here, the parenthetical illuminates the meaning of attendees for those doing the escorting without committing to an exhaustive list of escortees. The sentence itself is nonexhaustive but the parentheses do commit to a list. This style of parenthetical is often used in statutes[112] and causes controversy when a listed item makes little sense contextually, like the bunnies in the example.[113]

Third, parentheticals may be used to denote exceptions.[114] Used this way, a parenthetical would sever a particular thing or things from the meaning of the outside sentence. Generally, this

---

§ 290.091 (2022); MISS. CODE ANN. § 41-21-97 (2022); MO. REV. STAT. § 376.960 (2022); NEV. REV. STAT. § 81.630 (2022); N.H. REV. STAT. ANN. § 564:22 (2022); N.M. STAT. ANN. § 59A-22-5 (2022); N.Y. EDUC. LAW § 6231(B) (2022); OHIO REV. CODE ANN. § 5747.024 (2022); 42 PA. CONS. STAT. § 303.10 (2022); R.I. GEN. LAWS § 8-8.3-1 (2022); S.C. CODE ANN. § 33-31-150 (2022); S.D. CODIFIED LAWS § 1-44-11 (2022); VT. STAT. ANN. tit. 11, § 561 (2022); VA. CODE ANN. § 13.1-826(D) (2022); WASH. REV. CODE § 24.40.020 (2022); W. VA. CODE § 18B-13-1 (2022). This is not exhaustive.

[109] *See 6.95: Use of Parentheses,* CHI. MANUAL STYLE (2017), https://www.chicagomanualofstyle.org/book/ed17/part2/ch06/psec095.html ("He suspected that the noble gases (helium, neon, etc.) could produce a similar effect."). They are also called "clarifying" parentheses, but clarifications are also illustrations of an event, so the description holds.

[110] There are wide-ranging examples of this use of parentheses in statutes. Since they might take all sorts of forms, a citation to a collection of sections would do little use. However, some such statutes will be analyzed later on. *See* notes 215–19 and accompanying text.

[111] *See* Barnhart v. Thomas, 540 U.S. 20, 26 (2003) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.").

[112] *E.g.*, 42 U.S.C. § 6985 (2018); 42 U.S.C. §11292 (2018); 42 U.S.C. § 9837 (2018); 20 U.S.C. § 2342 (2018); ALA. CODE § 32-10-8 (2022); CAL. CIV. CODE §1102.6g (2022); COLO. REV. STAT. § 32-11-624 (2022); DEL. CODE ANN. tit. 7, § 6052 (2022); GA. CODE ANN. § 36-71-2 (2022); HAW. REV. STAT. §328-1 (2022); 205 ILL. COMP. STAT. § 620/2-11 (2022); IND. CODE § 3-6-4.2-12.5 (2021); IOWA CODE § 321E.29 (2022); KAN. STAT. ANN. § 12-3802 (2022); LA. STAT. ANN. § 30:548 (2022); MISS. CODE ANN. § 37-23-133 (2022); MONT. CODE ANN. § 22-2-403 (2022); N.Y. PUB. AUTH. LAW § 1299-a (2022); N.C. GEN. STAT. § 78A-27 (2022); 35 PA. CONS. STAT. § 770.3 (2022); 23 R.I. GEN LAWS § 23-24.10-3 (2022); S.C. CODE ANN. § 50-13-665 (2022); S.D. CODIFIED LAWS § 37-6-12 (2022); TENN. CODE ANN. § 39-17-408 (2022); VT. STAT. ANN. tit. 3, § 2471a (2022); W. VA. CODE § 8-23-2. This is not exhaustive.

[113] *See* notes 145–58 and accompanying text.

[114] *See, e.g.*, Jennifer Gunner, *Parenthetical Expressions: Types and Usage in Grammar*, YOUR DICTIONARY (last visited Nov. 1, 2022), https://grammar.yourdictionary.com/style-and-usage/parenthetical-expression-types-and-usage.html.

use may be identified with indicator words like "except," "but," "other than," and "aside from." For example: "Nothing (except true love's kiss) could awaken Snow White." The author of such statements specifically cuts away certain circumstances, indicating his consideration of those possibilities. Given that nature of specificity, it makes sense that the federal government and most states use exempting parentheticals and a variety of indicator words in statutes.[115] It also emphasizes the point that words inside the parentheses can be critical to the meaning of a sentence; not taking note of exceptions is a mistake in any playbook.

This Section demonstrated that the parenthesis can be a useful punctuation mark when a writer seeks to separate information from the main body of a sentence. It has also shown that just because words are put aside does not always mean they are less important. Parentheticals might have weight that changes the ordinary common meaning of a sentence. Legislators often use parentheses when drafting state and federal statutes to create definitions, illustrations, and exceptions. Despite the pervasiveness of the parentheses throughout writing, there is an ongoing legal movement that aims to lessen their inclusion in statutes for fear of creating a festering statutory ambiguity.[116]

B. PARENTHESES IN LEGAL DOCUMENTS

Parentheses offer an interesting challenge in the field of legal drafting. And their history departs from regular story of statutory punctuation. The early English statutes were held to include parenthetical marks in their original drafts.[117] As time went on, those statutes continued to have parentheses included in the original statute, or at least in the reprinted copies, used to demonstrate illustrations and exceptions.[118] This is especially interesting since parentheses were the exception

---

[115] *See, e.g.*, 46 U.S.C. § 7313 (2018) ("[E]ndorsement . . . (except vessels operating on rivers or lakes (except the Great Lakes)) may be prescribed by regulation."); 39 U.S.C. § 3626 (2018); 7 U.S.C. § 1387 (2018); 5 U.S.C. § 7342 (2018); ALA. CODE § 25-4-130 (2022); ALASKA STAT. § 45.07.504 (2021); ARK. CODE ANN. § 3-4-602 (2022); CAL. COM. CODE § 9109 (2022); COLO. REV. STAT. § 32-11-221 (2022); DEL. CODE ANN. tit 5, § 702 (2022); FLA. STAT. §625.031 (2022); GA. CODE ANN. § 48-2-33 (2022); HAW. REV. STAT. § 803-47.6 (2022); IDAHO CODE § 23-912 (2022); 220 ILL. COMP. STAT. 15/6 (2022); IND. CODE § 16-44-2-5 (2021); IOWA CODE §554.9317 (2022); KAN. STAT. ANN. § 75-2935 (2022); KY. REV. STAT. ANN. § 66.523 (2022); LA. STAT. ANN. § 3:3761 (2022); MD. CODE ANN., COM. LAW § 9-317 (2022); MASS. GEN. LAWS ch. 106, § 9-317 (2022); MICH. COMP. LAWS § 123.155 (2022); MINN. STAT. § 336.7-103 (2022); MISS. CODE ANN. § 27-9-13 (2022); MONT. CODE. ANN. § 50-31-103 (2022); NEB. REV. STAT. § 21-19, 131 (2022); NEV. REV. STAT. § 612.142 (2022); N.H. REV. STAT. ANN. §146:2 (2022); N.M. STAT. ANN. § 5-5-5 (2022); N.Y. ELEC. LAW § 2-122 (2022); N.C. GEN. STAT. § 58-7-15 (2022); N.D. CENT. CODE § 9-02-02 (2022); OHIO REV. CODE ANN. § 1303.26 (2022); OKLA. STAT. tit. 47, § 156.3 (2022); OR. REV. STAT. § 663.145 (2022); 16 PA. CONS. STAT. § 4520 (2022); 42 R.I. GEN LAWS § 42-116-31 (2022); S.C. CODE ANN. § 39-15-1150 (2022); S.D. CODIFIED LAWS § 37-6-12 (2022); TENN. CODE ANN. § 47-18-702 (2022); UTAH CODE ANN. §59-7-302 (2022); VT. STAT. ANN. tit. 7, §975 (2022); VA. CODE ANN. §58.1-341 (2022); W. VA. Code § 611.60 (2022); WYO. STAT. ANN. §35-2-425 (2022). This is not exhaustive.

[116] This does not include the use of parentheses for the enclosure of letters of numbers to indicate sections nor the enclosure of citation information. Both remain unchallenged aspects of legal writing and drafting.

[117] *See* notes 30–37 and accompanying text (describing the use of parentheses in the *Casement* case).

[118] *See, e.g.*, An Act for the Pacification between England and Scotland 1640, 16 Car. C. 17 §1 (Eng.) ("[W]hosoever shall be found upon trial and examination by the Estates of either of the two Parliaments (they judging against the persons subject to theire owne authority) to have been the authors and cause of the late and present troubles . . . ."); An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne 1688, 1 W. & M. c. 2 § 1 (Eng.) ("[E]very King and Queene of this Realme . . . at the time of his or her takeing the said Oath (which shall first happen) make subscribe and audibly repeate the Declaration mentioned in the Statute . . . ."); An Act to Settle the Trade to Africa 1697, 9 Will. 3, c. 26 § 7 (Eng.) ("to pay Five pounds per

to the general rule; while other marks were extremely uncommon, the parenthesis remained commonly used in the Statutes of the Realm.[119] As a discontented British lawyer, James Burrow, noted, "[T]o put one parenthesis within another is a great Fault in Language: But to *begin* a parenthesis *only*; and then (within that) to *begin another*; and never to end either; is much greater."[120] Burrow also noted, however, that the parenthesis "is of great Use and tends, in my apprehension, very much to perspicuity."[121] Burrow was right in noting both danger and usefulness in the mark.

Early American legal writers similarly used parentheses in the absence of other marks. Jefferson, for instance, wrote that statutes create confusion "from . . . parenthesis within parenthesis, and their multiplied efforts at certainty."[122] The use of parentheses in the long, unpunctuated statute was seen from the first days of the American colonies[123] but diminished after the American Revolution to make way for the regular system of punctuation. Though not a statute, this is best seen in the Constitution's use of punctuation as illustrative or exemptive. For instance, Article II, Section 2 states that the President must "solemnly swear (or affirm)" his oath.[124] Parentheses were also used in early state statutes[125] and legislation from the First Congress,[126] which was liberal with its use of the marks.

Despite their historically common usage, however, the parenthesis recently became embroiled in the normal debate regarding statutory punctuation. This is not because the understanding of punctuation changed,[127] nor because parentheses became less useful.[128] Rather, it is due to their ability to confuse a reader. As Burrow said, it is wrong to omit the use of parentheses, but they might be inadvertently made to "obscure the sentence to which [they are] introduced."[129] Such effects run afoul of a key tenet of interpretation, creating tension between a textualist and originalist view of the parenthesis' role in statutes: if the history and traditional usage of the parenthesis advise its inclusion in a statute but textual clarity advises its exclusion, which viewpoint should govern?

When interpreting a statute, one must give effect "to all its provisions, so that no part will be inoperative or superfluous."[130] Provisions necessarily include punctuation and often include parentheses,[131] and such provisions should be clear to grant them their due effect. Yet punctuation

---

Centum ad valorem at the Place of Importation upon all Goods and Merchandize (Negroes excepted) imported [in] England").

[119] *See, e.g.*, *supra* note 17.

[120] JAMES BURROW, DE USU ET RATIONE INTERPUNGENDI: AN ESSAY ON THE USE OF POINTING 21–22 (1771).

[121] *Id.* at 22.

[122] MELLINKOFF, *supra* note 17, at 253 (quoting 1 THE WRITINGS OF THOMAS JEFFERSON 65 (Lipscomb, ed. 1905)).

[123] *See* THOMAS GATES KNIGHT, VA. CO. OF LONDON, ARTICLES, LAWS, AND ORDERS, DIVINE, POLITIC AND MARITAL FOR THE COLONY OF VIRGINIA (1612) ("[I]f hee die intestate, his goods shall bee put into the store, and being valued by two sufficient praisors, his next of kinne (according to the common Lawes of England)").

[124] U.S. CONST. art. II, § 1; *see also* U.S. CONST. art I, § 8 ("[Congress may] exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square)"). For an illustrative use, see U.S. CONST. art. IV, § 4 ("on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence").

[125] *See, e.g.*, 1787 N.Y. Laws 234 (using an illustrative parenthetical).

[126] *See, e.g.*, 1 Stat. 55 (1789); 1 Stat. 125 (1790); 1 Stat. 131 (1790). This is *far* from exhaustive.

[127] *See* Yellin, *supra* note 16, at 718 ("[T]he Framers used [parentheses] in ways that are both familiar to modem readers and easy to understand.").

[128] *See, e.g.*, Lavery, *supra* note 66, at 228 ("For the draftsman the parentheses are of great importance . . . .").

[129] BURROW, *supra* note 120, at 21–22.

[130] Corely v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

[131] *See supra* notes 108, 112 & 118.

has a relatively greater chance of being deemed a scrivener's error,[132] and since parentheses modify sentence structure and references, they contribute to "the biggest source of uncertainty of meaning" in statutes.[133] Thus, when the text is the primary lens of statutory interpretation, the broad use of parentheses presents a problem. Not all punctuating modifiers are equal, however, and some accounts suggest the superiority of the parenthesis in certain circumstances. For instance, one leading book points out that "[p]arentheses, though generally frowned upon, are sometimes more reliable than commas in setting off a phrase when there is possible uncertainty as to how the ideas that follow the phrase are linked to those that precede it."[134] It also discusses how parentheses create clearer demarcations of asides than other marks.[135] Some other guidebooks agree that parentheses may impart clarity,[136] and a Pennsylvania law even codifies that idea.[137]

But the majority of sources disagree. The common wisdom provides "a rule against parentheses" in statutes.[138] The reason supporting the rule is that "[h]ow the courts would treat a parenthetical phrase (as for example on a motion to construe a will), is purely speculative."[139] Instead, they suggest that such illustrations and exemptions be placed at the beginning or end of a sentence in a statute.[140] Moreover, prominent legal writing commentators like Bryan A. Garner subscribe to the view that the words inside the parenthetical are less important to the overall meaning by virtue of their placement.[141] Less important words are dangerous in statutes, for judges typically follow clear statements from Congress,[142] and "afterthoughts" or "asides" might not meet that requirement.[143] A large number of state drafting guides have followed suit, explicitly disfavoring parentheses.[144] Even though this dominant view discredits helpful uses for parentheses

---

[132] SCALIA & GARNER, *supra* note 75, at 164–65.
[133] *See* DICKERSON, *supra* note 88, at § 6.1 at 101, § 8.21 at 188.
[134] *Id.* at § 8.21 at 189.
[135] *Id.* at § 6.1 at 103.
[136] *See, e.g.*, LYNN BAHRYCH & MARJORIE DICK ROMBAUER, LEGAL WRITING IN A NUTSHELL 134–35 (2003); HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING 58–61 (2008).
[137] *See* 101 PA. CODE §15.129 (2022) ("[Parentheses] are sometimes more reliable than commas in setting off a phrase where there is possible uncertainty").
[138] ROBERT N. COOK, LEGAL DRAFTING 31–32 (1951).
[139] ROBERT C. DICK, LEGAL DRAFTING 110 (1972).
[140] *See* COOK, *supra* note 138, at 32 (discussing exemption parentheticals).
[141] BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 153 (2001); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 1.33–34, 24 (2006); *see also* MORTON S. FREEMAN, THE GRAMMATICAL LAWYER 17 (1979); ESPENCHIED, *supra* note 15, at 96.
[142] *See, e.g.*, Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 Wash. U. L. Rev. 351, 376 (2019).
[143] BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE: THE AUTHORITY ON GRAMMAR, USAGE, AND STYLE 1020 (2016)
[144] *See, e.g.*, ALA. LEGIS., *Drafting Rule 11* (2021), https://alison.legislature.state.al.us/legal-division-manual#rule11; STATE OF ARK. BUREAU OF LEGIS. RSCH., LEGISLATIVE DRAFTING MANUAL 48; LEGIS. COMM'RS OFF. OF THE CONN. GEN. ASSEMBLY, MANUAL FOR DRAFTING REGULATIONS 40 (2018); LEGIS. COUNCIL DIV. OF RSCH., DELAWARE LEGISLATIVE DRAFTING MANUAL 97 (2019); KY. GEN. ASSEMBLY, BILL DRAFTING MANUAL 40 (2021); OFF. OF THE REVISOR OF STATUTES, MAINE LEGISLATIVE DRAFTING MANUAL 127 (2016); ALICE E. MOORE & DAVID NAMET, MASSACHUSETTS GENERAL COURT: LEGISLATIVE RESEARCH AND DRAFTING MANUAL 25 (2010); OFF. OF THE REVISOR OF STATUTES, MINNESOTA REVISOR'S MANUAL 313 (2013); N.M. LEGIS. COUNCIL SERV., LEGISLATIVE DRAFTING MANUAL 97 (2015); LEGIS. COUNCIL, NORTH DAKOTA LEGISLATIVE DRAFTING MANUAL 109 (2023); GEN. ASSEMBLY OF TENN. OFF. OF LEGAL SERVS., 2019 LEGISLATIVE DRAFTING GUIDE 14 (2019); TEX. LEGIS. COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL 102 (2020). This list not exhaustive, and there exceptions. *See, e.g.*, LEGIS. REFERENCE BUREAU, ILLINOIS BILL DRAFTING MANUAL 237 (2012) ([U]se commas or parentheses to set off an inserted phrase . . . .").

in legal documents and incorrectly assumes parenthetical phrases to be unimportant, it is right in one regard. Courts seem to have trouble determining the weight they should give to matter within parentheses. If the ambiguity faced by courts confronting parentheses is grievous, then the textualist argument against their inclusion holds water, despite the extensive history of the statutory parenthesis.

III. PARENTHESES AND STATUTORY INTERPRETATION IN PRACTICE

This Part examines the interpretation of statutory parentheses in actual court cases. Note that this analysis highlights cases in which the parenthetical statement *contributes* to the ambiguity. If the meaning is clear, there is no reason to consider the expression. The Supreme Court appears to generally disfavor the parenthesis. And yet there is an exception to this generalization. Lower courts, meanwhile, have no predisposition to parentheses and their interpretations vary widely. This parentheses problem is ongoing and there is no reliable guidance for judges.

A. THE SUPREME COURT

The Supreme Court has not explicitly addressed the role of parentheses in statutes. Its opinions, however, reflect the dominant view that parenthetical information should be disfavored. The Court addressed parentheses in the seminal case of *Chickasaw Nation v. United States*.[145] Both the majority and dissent acknowledged that parentheses played a role, but they battled over how much weight marks should be given. The parenthesis lost the battle in both the majority and dissenting opinions.

At stake in *Chickasaw Nation* were tax exemptions for Native American tribes.[146] Specifically, the Court examined language in the Indian Gaming Regulatory Act that reads:

> The provisions of [the Internal Revenue Code] (including sections 1441, 3402(q), 6041, and 60501, and chapter 35 of such [Code]) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter . . . .[147]

Two tribes argued that they were exempt from paying Chapter 35 taxes under this law since it was included in the illustrative parenthetical, even though Chapter 35 had nothing to do with the "reporting and withholding" of taxes.[148] A reading of the statute without the parenthetical would clearly have to pay these taxes, but because they were listed a part of the illustration, the tribes argued that Congress intended to include the unrelated chapter to the provision. The parenthetical's illustration was at odds with the rest of the statute. Although the case primarily concerned the Native American substantive canon of construction,[149] the Court discussed the parentheses to determine whether the statute was ambiguous.

---

[145] 534 U.S. 84 (2001).
[146] *Id.* at 86.
[147] *Id.* at 87.
[148] *Id.*
[149] *Id.* at 88.

Writing for the majority, Justice Breyer declined to give the parenthetical controlling weight. He began by saying that the language outside the parentheses was clear, limiting the illustration to items related to reporting and withholding and thereby making the illustration redundant:[150] If the items were already implicated in the outside language, why would examples be necessary to the meaning or effects of the statute? In his words, "the presence of a bad example in a statute does not warrant rewriting the remainder of the statute's language,"[151] especially when Congress would likely have made an exemption explicitly. Finally, the "give effect to each word" canon[152] was found to be inapplicable since Chapter 35 would deny the purpose of the statute and was set aside from the outside language anyway.[153] To the majority, "[a] parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of a statute."[154] The majority therefore endorsed the normal view of the legal community: parentheses deemphasize information.

Writing for the dissent, Justice O'Connor wrote that the language inside the parenthetical controlled. To her, however, the parentheses themselves were unimportant, mirroring her broad claim in *Ron Pair*.[155] Writing in a more purposivist fashion, O'Connor said that the parentheses, and the punctuation in general, did not matter and could be changed since a close analysis might "distort[] a statute's true meaning."[156] And reading without clear punctuation, she found that, if Congress included the illustration, there was reason to question both interpretations.[157] O'Connor concluded that there is "no generally accepted canon of statutory construction favoring language outside of parentheses to language within them, nor do I think it wise for the Court to adopt one today."[158] The dissent thought the text ambiguous enough to favor the tribes and the substantive canon at issue.

Neither opinion offered the parentheses support. On the one hand, the majority suggested that illustrative parentheticals are superfluous support for information already written. This would contradict traditional usage in favor of an overbroad grammatical understanding. On the other hand, the dissent would move back to the *Ewing's Lessee* days and ignore contrarian but congressionally approved punctuation. It was not until last Term that the Supreme Court substantively addressed the use of statutory parentheticals.[159] In these cases, the Justices mostly steered towards the majority's view in *Chickasaw Nation*, that parentheticals should not control meaning but added a grammatical presumption to the mix.

The first case, *Boechler v. Commissioner*, involved a statute that allows one to "within 30 days of a determination under this section petition the Tax Court for review of [a] determination *(and the Tax Court shall have jurisdiction with respect to such matter)*."[160] The illustrative parentheses here allow a reader to question whether the tax court has jurisdiction over the issue *only during the 30-day period*. Finding the statute ambiguous, the Court turned to the use of

---

[150] *Id.* at 89 ("One would have to read the word 'including' to mean what it does not mean, namely, 'including,' 'and.'")
[151] *Id.* at 90.
[152] *See supra* note 130 and accompanying text.
[153] *Id.* at 93–94.
[154] *Id.* at 95 (quoting Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984, 990 (4th Cir. 1996)).
[155] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 250 (1989) (O'Connor, J, dissenting).
[156] 534 U.S at 98 (O'Connor, J., dissenting) (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1994)).
[157] *Id.*
[158] *Id.* (citation omitted).
[159] United States v. Woods, 571 U.S. 31 (2013), did graze the issue, but the interpretation revolved mostly around the meaning of words, not the parenthesis as a punctuation mark. *Id.* at 45–46.
[160] Boechler v. Commissioner, 142 S. Ct. 1493, 1497 (2022) (emphasis added).

parentheses as a punctuation mark and dismissed them out of hand, finding them not to indicate an "express" condition.[161] Quoting Garner, the Court formally took the view that a parenthetical is "typically used to convey an 'aside' or 'after thought.'"[162]

The next case, *Becerra v. Empire Health Foundation*,[163] solidified this renewed disfavoring of parentheses. At issue was a "byzantine" hospital reimbursement statute that said a hospital could be refunded based on a fraction.[164] That fraction is calculated in part by counting "'the number of [a] hospital's patient days' attributable to low-income patients 'who *(for such days)* were entitled to benefits under part A of [Medicare].'"[165] A similar fraction is calculated for Medicaid, and the two are added together to determine a possible refund.[166] The ambiguity involved how Medicare patients are counted in the fraction of days which they are not eligible for payment.[167] The respondent hospital argued that a regulation finding such patients eligible is not reflected in the statutory language.[168] As part of its argument, it read "entitled" to be modified by the parenthetical "(for such days)."[169] This interpretation would mean that a patient must be able to *actually receive* Medicare for their hospital days, rather than simply meeting Medicare's automatic enrollment requirements.

The majority tore that reading apart. Justice Kagan, citing *Boechler*, said that Congress would not wish to change a statutory scheme with parentheses and so "(for such days)" is "incapable of bearing so much interpretive weight."[170] Congress would not change that "settled" statutory definition of being entitled to benefits by using a "subtle, indirect, and opaque" punctuation mark.[171] Instead, that parenthetical works "hand in hand" with the normal definition of entitlement and asks hospitals to include a patient when he is eligible for Medicare on a given day.[172] This makes sense. The parenthetical did not clearly provide a new definition nor did it use exemplifying words to indicate a departure from the common meaning.

Though correctly decided, however, the majority went too far in its treatment of punctuation. The decision could have been narrowly written to disfavor only these particular illustrative marks. Instead, Justice Kagan deemed parentheses to be altogether unhelpful in determining congressional intent by virtue of Garner's incorrect grammatical understanding. Writing for the dissent in this 5–4 case, Justice Kavanaugh addressed this misunderstanding, saying that "[p]arentheticals can be important."[173] To be sure, the parentheses were only a small part of this case and its conclusion, but they nevertheless played a role in both statutory interpretations and underscored disagreement about their importance in hard cases.

Regardless of the Court's poor treatment in *Empire Health*, a majority (that included Justice Kagan) used a parenthetical to establish jurisdiction in *Biden v. Texas*.[174] The provision in

---

[161] *Id.* at 1498.
[162] *Id.* (quoting BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE: THE AUTHORITY ON GRAMMAR, USAGE, AND STYLE 1020 (2016)).
[163] 142 S. Ct. 2354 (2022).
[164] *Id.* at 2362 (quoting Cath. Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914, 916 (2013))
[165] *Id.* at 2358 (quoting 42 U.S.C. § 1395ww(d)(5)(f)(vi)(I) (2018) (emphasis added)).
[166] *Id.* at 2360.
[167] *Id.* This would happen, for instance, if a Medicare user had private insurance. *Id.*
[168] *Id.* at 2361.
[169] *Id.* at 2365.
[170] *Id.* (citing Boechler v. Commissioner, 142 S. Ct. 1493, 1498 (2022)).
[171] *Id.*
[172] *Id.*
[173] *Id.* at 2369 (Kavanaugh, J., dissenting) (pointing out Constitution provisions with parentheses).
[174] 142 S. Ct. 2528, 2538 (2022).

question decreed that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [certain immigration statutes]."[175] One issue in this case was whether lower courts had subject matter jurisdiction for such injunctive immigration cases. For the majority, the Chief Justice wrote that "the parenthetical explicitly preserv[ed] this Court's power to enter injunctive relief."[176] It determined that Congress had given the Court a specific "carveout" that permitted the injunctive relief case at bar.[177] To ignore the parenthetical exception that Congress "took pains" to address would be, in the majority's view, to fail the "give effect" presumption of statutory interpretation.[178] And parenthetical exceptions must have use under the "give effect canon" since Congress set the exception apart.

Justice Barrett took a different view. She noted that the majority gave "surprisingly little attention" to the parenthetical, which "does not appear to have an analogue elsewhere in the United States Code."[179] Specifically, the dissent posited that the parenthetical might *illustrate* preexisting jurisdiction rather than provide an *exemption* in certain cases.[180] This ambiguity, among other reasons, is reason enough for the Court to reconsider the parenthetical, despite its "surface appeal."[181] Though the possibility of reconsideration remains in light of the dissent, this case departs from the presumption against parentheses because a parenthetical granting jurisdiction was allowed to control against an otherwise restrictive outside text.

The debate over parentheticals continues today. The Court recently heard arguments in *Sackett v. EPA*,[182] which concerns whether wetlands are navigable waters of the United States. One clue comes from a statute allowing "any State desiring to administer its own . . . program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, including wetlands adjacent thereto) within its jurisdiction" to submit a request for such a program.[183] This law seems to indicate that navigable waters might include wetlands since they were mentioned as an example in the parenthetical. Though there are questions concerning the meaning of "adjacent,"[184] a larger question is whether Congress wished to change or define navigable waters using this parenthetical.[185] The Sacketts maintained that this parenthetical should not be read to control the statutory meaning as it would be "an inversion of statutory interpretation to say that this parenthetical reference in a provision dealing principally with permit . . . changes the scope of the central definitional portion of the Act . . . ."[186] The Sacketts also cited the *Boechler* decision and its adoption of the Garner view in their brief.[187] And, during oral arguments, Justice Alito questioned the use of the parenthetical to provide a "clear statement" of congressional intent.[188] The parenthetical alone might not determine the outcome of this case, but it will likely contribute to the broader discussion.

---

[175] *Id.* (quoting 8 U.S.C. § 1252(f)(1) (2018)).
[176] *Id.* at 2539.
[177] *Id.*
[178] *Id.* (quoting Williams v. Taylor, 529 US. 362, 404 (2000)).
[179] *Id.* at 2561 (Barrett, J., dissenting).
[180] *Id.* at 2562.
[181] *Id.*
[182] Sackett v. EPA, No. 21-454 (Sup. Ct., Oct. 3, 2022).
[183] 33 U.S.C. § 1344 (2018).
[184] *See* Transcript of Oral Argument at 33, *passim*, Sackett v. EPA (Oct. 3, 2022) (No. 21-454).
[185] *See id.* at 27–29.
[186] *Id.* at 57–58.
[187] Reply Brief for Petitioner at 7, Sackett v. EPA, No. 21-454 (Sup. Ct. July 8, 2022).
[188] Transcript of Oral Argument at 106, Sackett v. EPA (Oct. 3, 2022) (No. 21-454).

In summary, these cases demonstrate that the modern, textualist Supreme Court has not firmly determined how parentheses are to be weighed in statutes. Overall, however, it seems as if parentheticals are disfavored in tough cases. *Chickasaw Nation* said it outright regarding conflicting illustrative parentheticals. New decisions defer to Garner's view: that parentheses indicate unimportant asides and should therefore not control meaning. The decision in *Biden v. Texas*, meanwhile, offers the opposite conclusion given the Court's explicit reliance on a parenthetical. The treatment of the parenthesis is an ongoing debate in the Court, and there is no clear trend one way or another from the lower courts in years past.

B. LOWER COURTS

Other courts, state and federal, have both favored and disfavored statutory text in parentheses. Though these rulings predate recent Supreme Court rulings, they still provide helpful insights. And unlike Supreme Court cases, lower courts have acknowledged the different contextual uses of parentheses.[189] As such, this Section will look at the treatment of definitional, exempting, and illustrative parentheses, as explained in Part IIA of this Note.

Beginning with parentheticals defining or very similarly clarifying statutory terms, only one case is worth pointing out. It explicitly favors the use of the marks to carry Congressional meaning. In *United States v. Coscia*,[190] a defendant challenged language that criminally made it unlawful to engage in behavior "known to [his] trade as 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)."[191] The defendant argued that the statute did not define "spoofing," but referred to industry terminology because quotation marks were inserted around "spoofing."[192] That argument did not work. The court held that the presence of a parenthetical definition made industry reference "irrelevant."[193] The defendant next relied on *Chickasaw Nation* to disfavor the parenthetical definition. That comparison was flawed. The court wrote that, unlike the surplus, illustrative parentheses in *Chickasaw Nation*, the marks there were used to identify a definition, and that the Supreme Court relied on a parenthetical definition before.[194] Further, the Circuit Court noted that an illustrative use was indicated by the word "including," which was not at issue in their case.[195] Eventually, those parentheses were held to define "spoofing" and were therefore used to uphold the defendant's conviction.[196] In applying definitions, the parenthesis was found to be a helpful interpretive aid.[197]

Lower courts have generally found the same when applying exemptive parentheses. For instance, in *United States v. Thomas*,[198] a court relied on parenthetical information in the U.S. Sentencing Guidelines that discuss drug crimes.[199] The specific wording concerned law "that

---

[189] *See, e.g.*, United States v. Monjaras-Castaneda, 190 F.3d 326, 330 (5th Cir. 1999); *infra* part IIA.
[190] 866 F.3d 782 (7th Cir. 2017).
[191] *Id.* at 791 (quoting 7 U.S.C. § 6c(a)(5) (2018)).
[192] *Id.*
[193] *Id.*
[194] *Id.* at 792 (quoting Lopez v. Gonzales, 549 U.S. 47, 52–53 (2006)). *Lopez* was not included in Part IIIA since the dispute there did not involve the parentheses themselves.
[195] *Id.*
[196] *Id.* at 790–93, 803.
[197] *C.f.* Janssen Pharmaceutica, N.V. v. Eon Labs Mfg., Inc., 134 Fed. Appx. 425, 428 (Fed. Cir. 2012) (understanding parentheses to clarify or define terms in a patent case).
[198] 939 F.3d 1121 (10th Cir. 2019).
[199] *Id.* at 1123.

prohibits the . . . distribution of a controlled substance (or a counterfeit substance)."[200] Noticeably, the use of "or" here, rather than "except" or something similar, makes this an atypical exemption. The effect, however, remains the same; the parenthetical carves out an instance in which the outside language would not control. In *Thomas*, even though there was no controlled substance, the sentence still applied due to the parenthetical exception.[201] The Tenth Circuit, interpreting this text, also distinguished the case from *Chickasaw Nation*. They wrote that the Supreme Court did not consider parentheses as "necessarily surplusage" and that, since the marks were a "central subject" in that case, they should be given "substantive effect" in the guidelines.[202] Unlike the illustrative parenthetical, the court found that the exempting parenthetical in this case was intended to "expand[] the scope of the guidelines to include things that would generally not be considered subsets of the term in its common meaning."[203] Thus, the Guidelines intended the given sentence to apply also to counterfeit drugs. The majority also noted that the parentheses were "more likely to have been for purposes of readability than to signify unimportance."[204]

The dissent would disfavor this parenthetical. First conforming to the broad Garner approach, it says that "the substantive reach of the district court's and majority's reading would seem to merit more than a mere parenthetical."[205] Next, it argues the parenthetical would better "*illustrate or explain* the broader proposition" since an exemptive, expansive meaning would take the definition "too far."[206] The majority counters by writing that "including" would have been used instead of "or" if that view was correct.[207] While the use of "or" is not the clearest way to demonstrate an exception to the outside text, other courts have followed the majority in similar cases involving statutes rather than the Garner approach or *Chickasaw Nation*.[208]

Lower courts have also favored the more straightforward exceptions. In *United States v. Krahenbuhl*,[209] a magistrate judge confirmed that the parenthetical "(and not under the charge and control of the General Services Administration)" created a "statutory exception to the VA statute when the GSA is in control of a facility."[210] And in *Fellows v. City of Los Angeles*,[211] a party challenged their applicability to text requiring that anyone "having in any county in the state (other than in any city, city and county, or town therein) appropriated waters for sale" to provide water to inhabitants.[212] The California Supreme Court, even at a time when punctuation was not understood to be part of statutes, recognized the language to include an "exception [en]closed in parentheses."[213] Overall, these past cases and others indicate that the lower courts tend not to

---

[200] *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2(B) (U.S. SENT'G COMM'N 2021)).
[201] Though the guidelines are not a statute, the court uses normal statutory interpretation in this case, as if examining a statute.
[202] *Id.* at 1126–27.
[203] *Id.* at 1127.
[204] *Id.*
[205] *Id.* at 1141 (Matheson, J., dissenting).
[206] *Id.* at 1142 (quoting Mizrahi v. Gonzales, 492 F.3d 156, 166 (2d Cir. 2007)).
[207] *Id.* at 1127 (majority opinion).
[208] *See, e.g.*, Disabled in Action of Penn v. SE Penn. Transp. Auth., 539 F.3d 199, 212 (3d Cir. 2008); Kuhns v. Ledger, 202 F.Supp.3d 433, 437–48 (S.D.N.Y. 2016); Holmes Fin. Assocs. v. Resol. Tr. Corp., 33 F.3d 561, 566–67 (6th Cir. 1994); Cemco Invs. LLC v. United States, No. 04 C 8211, 2007 WL 951944, at *9 n.8 (N.D. Ill. Mar. 27, 2007).
[209] No. 21-CR-127, 2022 WL 134732 (E.D. Wis. Jan. 14, 2022).
[210] *Id.* at *5.
[211] 90 P. 137 (Cal. 1907).
[212] *Id.* at 139.
[213] *Id.* The language in question, passed in 1885, further supports the contention that parentheses are the exception to an otherwise punctuation-less standard in statutory drafting.

discount exempting parentheticals since they demonstrate legislative carveouts from otherwise applicable statutory texts.[214]

Finally, even after the *Chickasaw Nation* decision, lower courts divide over the weight of illustrative parentheses. Some courts have held that they bear interpretive meaning. In *United States v. Monjaras-Castanda*,[215] a defendant appealed a conviction for an "aggravated felony [which includes] an offense described in paragraph 1(A) or (2) of section 1324(a) of [the statute] (related to alien smuggling)."[216] That use of parentheses is certainly illustrative since it contextualizes and modifies the outside text. The defendant argued that the statute was ambiguous, reading the parentheses to modify "offense" rather than the specified sections in the statute.[217] In this case, the defendant *transported* aliens but did not *smuggle* them. The majority affirmed the conviction, using the parentheses "descriptively" as an "aid to identification."[218] The parenthetical generally described the sorts of offenses in the listed sections. Because the referenced sections were held not to restrict transportation crimes, the punctation had identified the defendant as a felon.[219]

The issue is that the rest of the statute tended to differentiate smuggling from transportation crimes.[220] It is at least possible that the parenthetical used this way inverted the statutory text as the *Chickasaw Nation* parentheses did. The dissent noted this conflict, writing that "if Congress had intended to include *any* crime listed in [the sections] as an aggravated felony, it simply would have said so."[221] Further, it commented that grammatical analysis did not resolve the ambiguity and therefore "the language [was] not properly weighed."[222] If *Chickasaw Nation* was applied, this illustrative parenthetical would have been disfavored, but this case took the opposite view: "[c]ourts have often construed parentheticals in statutes in this manner."[223] In the right case, an illustrative parenthetical might control the outside language.[224]

But the Supreme Court readings concerning illustrative parentheticals are powerful. In *Shalala v. Huntington Hospital*,[225] the same "(for such days)" parenthetical later disfavored in *Empire Health* was under review by the Fourth Circuit.[226] The majority opinion in that case wrote that "an oblique 'for such days' parenthetical [does not imply] that Congress was superseding its own statutory definition. [The dissent] relies on the parenthetical to drive the interpretation of the whole provision, thereby allowing the statutory tail to wag the dog."[227]

---

[214] *See also* Lewis v. Hitt, 370 So.2d 1369, 1370 (Ala. 1979); United States v. Monjaras-Castaneda, 190 F.3d. 326, 330 (5th Cir. 1999); *c.f.* Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 406 (4th Cir. 1998) (affirming an exemption parenthetical in construing an insurance policy).
[215] 190 F.3d. at 326.
[216] *Id.* at 328 (quoting 8 U.S.C. § 1324(a)(1)(A) (2018)).
[217] *Id.* at 328–29.
[218] *Id.* at 330.
[219] *Id.*
[220] *Compare* 8 U.S.C. § 1324(a)(1)(B)(i) (2018) *with* 8 U.S.C. § 1324(a)(1)(B)(ii) (2018); 8 U.S.C. § 1227 (a)(1)(E)(i) (2018).
[221] 190 F.3d at 332 (Politz, J., dissenting).
[222] *Id.*
[223] *Id.* at 330 (majority opinion).
[224] *See also* Sweatt v. Foreclosure Co., 212 Cal.Rptr. 350, 351–52 (Cal. Ct. App. 1985); *c.f.* Stifel, Nicolaus, & Co. v. Shift Techs., No. 21 Civ. 4135 (NRB), 2022 WL 3648145, at *4–5 (S.D.N.Y. Aug. 23, 2022) (reading "illustrative" parentheses to control the construction of a contract).
[225] Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984 (4th Cir. 1996).
[226] *Id.* at 988 (quoting 42 U.S.C. § 1395ww(d)(5)(f)(vi)(I) (2018)); *see supra* note 165.
[227] *Id.* at 990.

In *Chipperfield v. Missouri Air Conservation Commission*,[228] at issue was a regulation requiring an analysis that computes "an emission limitation (including a visible emission limit) based on the maximum degree of reduction for each pollutant which would be emitted.''[229] The word "including" shows that this use of parentheses mirrors those in *Chickasaw Nation*. One party interpreted the parenthetical to mean that a visible emission limit must be found for all cases involving a pollutant, while the other said that it would be necessary only sometimes.[230] The Missouri Appellate Court's treatment also mirrored that case. It took the step of combining the *Chickasaw Nation* surplusage approach with the Garner approach. The court began by saying that "the meaning of the words within the parentheses should be considered as incidental explanatory matter which is not a part of, or at least is not essential to, the main statement."[231] This conclusion was reached by first noting that the parenthesis separates textual matter, and then following Garner and his inferential step. The use of "incidental[] and helpful[]" marks could not conjure a condition that would lead to the "absurd result of requiring a visible emission limit for an invisible pollutant."[232] Thus, the parenthetical there was not held to control the text.[233]

* * * * *

In practice, courts steer away from giving operative meaning to parenthetical statements. The Supreme Court initially threw out illustrative parentheses in *Chickasaw Nation* and questioned their substantivity in recent cases. Lower courts, meanwhile, have no standardized method. At that level, it is at least clear that some grammatical uses have higher survival rates than others.

IV. A PROPOSAL ABOUT PARENTHESES

The current lay of the land regarding the statutory parenthesis is confusing and often contradictory. Courts would be correct to limit the application of certain purpose-defying parentheses, but wrong to adopt an overbroad view. This Part provides a solution via a proposed canon of construction.

A. THE NEED FOR A CANON OF CONSTRUCTION

Canons of construction are neutral "rules of thumb" often used by judges to determine legislative intent using the text of the statute.[234] While they have existed for hundreds of years,[235]

---

[228] 229 S.W.3d. 226 (Mo. Ct. App. 2007).
[229] *Id.* at 251 (quoting 10 CSR 10–6.020(2)(B)5). Regulations are interpreted with normal tools of statutory interpretation. *See id.* at 251–52.
[230] *Id.* at 251.
[231] *Id.* at 252.
[232] *Id.*
[233] *C.f., e.g.*, United States v. Bank of Am. Corp., 753 F.3d 1335, 1338 (D.C. Cir. 2014) (similarly interpreting a claim release); Knox v. Krueger, 145 N.W.2d. 904, 908 (N.D. 1996) (interpreting a judgment); Boston Helicopter Charter, Inc. v. Agusta Aviation Corp., 767 F. Supp. 363, 370–71 (D. Mass. 1991) (interpreting a contract).
[234] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2465 n.285 (2003); *see also* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Us in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 79 (2018).
[235] Bradford C. Mank, *Textualism's Selective Canons of Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY L. REV. 527, 542 (1998).

they are especially popular in today's textualist era because "they approximate Congress' drafting practices and likely preferences" for statutes, and are linked directly to the words on the page.[236] For similar reasons, the prevailing canons tend to be "syntactic," rather than "substantive," meaning they contain "grammatical and punctuation rules . . . by reference to what ordinary English speakers mean when they use or read particular words and sentences."[237] As such, these syntactic canons "pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature's intent."[238] Among these canons are the last antecedent, *inclusio unius*, and punctuation canons.[239] Such canons are brought to bear when two readings of a legal text are possible, for "the canons are the vocabulary of statutory interpretation."[240] While some may question the viability or the correct usage of these canons, such debates are beyond the point of this Note, and it is simply enough that they continue to be prevalent today.

Just as some canons can fall out of favor, others may be created by the Courts. Possibly since it has become so ingrained into the fabric of modern textualism, the punctuation canon has fallen out of explicit use.[241] However, other canons have been "invented" fairly recently,[242] or older canons have been "modified" to fit modern understandings.[243] Professor Nina Mendelson found that new additions "had to take a rule-like form—to be articulated as an interpretive principle applicable across a range of statutory settings—and had to have been applied repeatedly."[244] Longtime practice or tradition is also a necessary element of the equation because some legal or historical foundation is needed to stop courts from arbitrarily creating statutes.[245] Applying the original understanding of a grammatical rule or punctuation mark might serve to satisfy this element in new syntactical canons.

The ongoing mess concerning the statutory parenthetical calls for a new canon of construction. Although the last antecedent rule has been applied to uncover which words a parenthetical has modified,[246] it is not enough to provide a useful range of guidance. It is the role of the parenthesis itself that provides courts the confusion; whether treating them as less important would upset congressional intent. Such questions have been litigated repeatedly in state and federal court, and they are not going away given the number of parentheses in federal and state law. Chief Justice Roberts has even said that the Supreme Court has faced an "unfortunately large number of cases where we do this type of parsing."[247] Resting on the safe assumption that the punctuation canon is implicitly used in current statutory interpretation cases, it would help to have

---

[236] Mendelson, *supra* note 234, at 75; *see also, e.g.*, Eskridge, *supra* note 73, at 625; Mank, *supra* note 235, at 549.
[237] Mendelson, *supra* note 234, at 80; *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2159 (2016).
[238] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010).
[239] *See id.*; Mendelson, *supra* note 234, at 80; Valerie C. Brannon, CONG. RSCH. SERV., STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 29–31 (2022).
[240] *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING THE LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 21 (2016) (emphasis omitted).
[241] *See* Mendelson, *supra* note 234 at 101–02. The punctuation canon tells courts that "punctuation is a permissible indicator of meaning." SCALIA & GARNER, *supra* note 75 at 161.
[242] Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation*, 54 WM. & MARY L. REV. 753, 765 (2013).
[243] Mendelson, *supra* note 234, at 111.
[244] *Id.*
[245] *C.f.* Barrett, *supra* note 238, at 128– 54 (tracking historical underpinnings of substantive canons).
[246] *See* Boston Helicopter Charter, Inc. v. Agusta Aviation Corp., 767 F. Supp. 363, 370–71 (D. Mass. 1991)
[247] Transcript of Oral Argument at 27–28, Boechler v. Comm'r, 142 S. Ct. 1493 (Jan. 12, 2022) (No. 20-1472).

an agreed-upon usage of parentheses. That way, courts would no longer need to inquire as to their significance while parsing such language.[248]

Two arguments against a new canon must be addressed. First, one could argue that a canon is not necessary since other, more fundamental, canons could already do the heavy lifting in parenthetical interpretation. This argument has merit. There are, after all, other syntactic or contextual canons that diminish the need for a new one. For instance, it might be that the *ejusdem generis* canon[249] or the harmonious-reading canon[250] might signal the discounting of contrary words in an "including" illustrative parenthetical. And the Interpretive-Direction canon could be used to convince courts to follow parenthetical definitions.[251] The issue is that these canons were not invoked in the applicable cases, and they might not always achieve the correct result even if they were. There could be cases where an item in a parenthetical list could include something of a general class but that nonetheless contradicts the meaning of the text, defeating the applicability of *ejusdem generis*. Further, the mood of current judges is to inquire about the punctuation marks rather than the context of the words around them. Those marks are more closely linked with the passed text than contextual relationships and should therefore be standardized with a new canon.

One could also argue that the Court has already implicitly made a canon that would discount parenthetical information when it conflicts with outside text. After all, in three cases over the past couple of years, the Garner definition of parentheses—that they indicate unimportant phrases—has been cited favorably in the Supreme Court.[252] There are three things wrong with this view as a canon. First, this line of cases is disrupted by *Biden v. Texas*, in which the Court explicitly relied on parentheses.[253] For a canon to be born, it must be similarly "applied repeatedly" across cases, and the *Biden v. Texas* departure violates that principle. Second, it does not account for the various uses of parentheses and would apply negative treatment across the board. Such lack of nuance could circumvent congressional intent, especially in cases like *Biden v. Texas* that involve expressly carved-out exceptions. Third, it is debatable whether the Garner definition is even correct. Parentheses can and do change the meaning and context of sentences and statutes.[254] Lower courts have noted this across cases, and have applied them differently to reflect this.[255]

It would be wrong to jettison the lower courts' findings and an ongoing grammatical and legal debate for a narrow, brutish understanding; if parentheses cannot impart important parts of a law, why does Congress use them at all? A well-reasoned canon of construction would instead recognize the weaknesses and strengths of statutory parentheses in light of their history and grammatical context. The next Section proposes such a canon.

---

[248] *See* Transcript of Oral Argument at 106, Sackett v. EPA (Oct. 3, 2022) (No. 21-454); Transcript of Oral Argument at 13, 27–31, 53–54, Boechler v. Comm'r, 142 S. Ct. 1493 (Jan. 12, 2022) (No. 20-1472); Transcript of Oral Argument at 56, Becerra v. Empire Health Found., 142 S. Ct. 2354 (Nov. 29, 2021) (No. 20-1312).

[249] *See* SCALIA & GARNER, *supra* note 75, at 199 (The *esjusdem generis* canon means that a "general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.").

[250] *See id.* at 180 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). This may also be used to discount a confusing or contrarian illustrative parenthetical.

[251] *See id.* at 225 ("Definition sections and the interpretation clauses are to be carefully followed.").

[252] *See* Boechler v. Commissioner, 142 S. Ct. 1493, 1497 (2022); Reply Brief for Petitioner at 7, Sackett v. EPA, No. 21-454 (Sup. Ct. July 8, 2022); Becerra v. Empire Health Found., 142 S. Ct. 2354, 2365 (2022).

[253] *See supra* notes 176–77 and accompanying text.

[254] *See supra* part IIA.

[255] *See supra* part IIIB.

B. THE PROPOSED PARENTHESIS CANON

Courts should adopt the following as a new syntactic canon of construction: "a statement in parentheses should be discounted when it conflicts with the rest of the text, but an exception or definition in parentheses should not." This "rule-like form"[256] meets the test for becoming an accepted canon as it makes sense legally, grammatically, and historically. This final Section delves into three reasons why.

First, the legal history of parentheses and punctuation is inverted in a way that justifies a dedicated canon of construction. Parentheses aided legislators from the very start in a way its sister marks did not. Statutory drafting necessarily required breaks in sentences, especially during a time when commas and semicolons were rarely used. The parenthesis was, however, commonly used to mark those breaks, even in the 14th century.[257] Moreover, those early punctuations indicating sentence breaks were invoked in the *Casement* case as a matter of statutory interpretation.[258] Parentheses remained in use by legislators in the American colonies and the first Congress,[259] and should therefore be acknowledged as valuable interpretive asset.

Though each of the uses of the parenthesis—definitional, exemptive, and illustrative—were used in those past eras, certain uses had clearer intentions than others. For instance, in one old British statute, a parenthetical read that a person would be tried by the "[English and Scottish] Parliaments (they judging against the persons subject to theire owne authority)" in certain cases.[260] When compared against two-word exemptions seen in other statutes,[261] and perhaps ornamental parentheticals in others,[262] it becomes apparent that some uses have always been cleaner. Similarly, the constitutional wording, "(Sundays excepted),"[263] demonstrates a clear intention that Sundays are not included in counting the days a President has to consider a bill.[264] The Drafters clearly knew what they were doing in setting exceptions, and those clear intentions are neither extraneous nor unimportant.[265] In fact, the interior matter could determine what is a law and what is not. Later on, the idea of using punctuation to decide cases was shunned, but this canon of construction favoring the differentiation of uses based on clarity has early historical strength.

As the favorability of punctuation increased, the favorability of parentheses rightly decreased. If a detached phrase contradicts its parent sentence, there are reasons to discard it. Due to such ambiguous parentheticals, legal guides across the country warned against any usage.[266]

---

[256] Mendelson, *supra* note 234, at 111.
[257] *See, e.g.*, *supra* notes 34–35.
[258] MELLINKOFF, *supra* note 17, at 168 (quoting R v. Casement (1917), 86 L.J.K.B. 482, 486 (C.A. 1916) (mentioning parentheses by name). Also note that in Britain, brackets and parentheses are the same thing. *See* Neha Srivastava Karve, *Brackets and Parentheses: British vs. American*, EDITOR'S MANUAL (Nov. 6, 2022), https://editorsmanual.com/articles/brackets-british-vs-american/.
[259] *See supra* notes 122–26.
[260] An Act for the Pacification between England and Scotland 1640, 16 Car. C. 17 §1 (Eng.).
[261] *See* An Act to Settle the Trade to Africa 1697, 9 Will. 3, c. 26 § 7 (Eng.).
[262] An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne 1688, 1 W. & M. c. 2 § 1 (Eng.) ("the Prince of Orange "whome it hath pleased Almighty God to make the glorious Instrument of Delivering this Kingdome from Popery and Arbitrary Power) . . . ."
[263] U.S. CONST. art. I, sec. 7.
[264] *See id.* For similar constitutional language, see also *id.* ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary *(except on a question of Adjournment)* shall be presented to the President . . . .") (emphasis added).
[265] *See* Becerra v. Empire Health Found., 142 S. Ct. 2354, 2369 (2022) (Kavanaugh, J., dissenting); Kesavan & Paulsen, *supra* note 43, at 337.
[266] *See supra* notes 138–144.

The proposed canon takes both the good and bad history into account. It recognizes that ambiguity is the greatest danger in interpretation by setting a presumption against parentheses. Yet it also respects that different uses are less ambiguous and avoids the overbroad view seducing the law. Under this canon, the hardest part of interpreting a problematic parenthetical would be determining what use the parentheses at issue serve.

Second, the proposed canon can be synthesized by examining past caselaw. It is thereby seen that it has been "applied repeatedly" by the courts "across a range of statutory settings."[267] The presumption against parentheses comes from previous Supreme Court directives and the benefits of legal certainty. The most influential case concerning parentheses is *Chickasaw Nation*, and that case also controls many interpretations under the proposed canon. As in that case, the canon accepts many parentheticals should be disfavored because they "cannot be used to overcome the operative terms of a statute."[268] This is especially true concerning illustrative uses like those in *Chickasaw Nation*, for such parentheses are only there to give courts an understanding of how outside text might apply or be implemented; if the inside text is confusing or risks the purpose of the provision, then it makes sense to discard it since it serves the outside text.[269] While *Boechler* and *Empire Health* did not feature the same kind of illustrative parentheses, they followed the same rule as the majority in *Chickasaw Nation* and disfavored the marks.

Empire Health interpreted the illustrative parenthetical in question as a poor indication that congress sought to drastically morph the meaning and value of a complex Medicare scheme.[270] This decision makes sense logically and keeps in line with the proposed canon and lower court decisions. In fact, it mirrors the view of the Fourth Circuit in interpreting the same statute in a different case. Just as the Court found it unlikely that the illustration would change the meaning through an "opaque mechanism,"[271] the circuit court refused to "allow[] the statutory tail to wag the dog."[272] It is true that some courts, like the Fifth Circuit in *United States v. Monjaras-Castanda*, have interpreted illustrative parentheses the other way. But these cases are the outliers, especially after the new guidance from Supreme Court in *Empire Health* and *Boechler*. Thus, the proposed canon respects the Supreme Court's recent decisions, stabilizing them into a presumption against most parentheticals.

There is a distinction, however, that is important to note in drawing the new canon. *Empire Health* left the perception of parentheses open,[273] while *Boechler* adopted the overbroad view characterizing the parenthesis as "used to convey an 'aside' or 'after thought.'"[274] The *Boechler* case indiscriminately targets the parenthesis. It is that view the proposed canon battles. Attorneys and courts must not prevail on an argument that statutory language should be dropped by virtue of its unfortunate placement in a parenthetical.

The proposed canon exempts definitional and exemptive parentheses from the above presumption to add the nuance *Boechler* misses. This move is also backed by caselaw. On the Supreme Court level, *Biden v. Texas* incorporates the idea that exceptions in parentheticals deserve

---

[267] Mendelson, *supra* note 234, at 111.
[268] Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001) (quoting Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984, 990 (4th Cir. 1996)).
[269] *See* SCALIA & GARNER, *supra* note 75, at 63–65.
[270] *See* Becerra v. Empire Health Found., 142 S. Ct. 2354, 2365 (2022).
[271] *Id.*
[272] Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984, 990 (4th Cir. 1996).
[273] *Compare* 142 U.S. at 2365 *with* 142 U.S. at 2369 (Kavanaugh, J., dissenting).
[274] Boechler v. Commissioner, 142 S. Ct. 1493, 1498 (2022) (quoting BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE: THE AUTHORITY ON GRAMMAR, USAGE, AND STYLE 1020 (2016)).

protection. Though it was an ambiguous statement warranting its own dissent,[275] the parenthetical was held to exempt the Supreme Court from a prohibition of jurisdiction.[276] In similar cases interpreting an exemption parenthetical, lower courts favored the *Biden v. Texas* majority. They used the parentheses to chart the interpretation. Courts including the Tenth Circuit,[277] the California Supreme Court,[278] and the Eastern District of Wisconsin[279] have all recognized parenthetical supremacy against the rest of the text when faced with an exempting parenthetical. Indicator words signaled to the court that the inside words were specifically considered by the drafter, and were therefore given deference. The proposed canon does the same, preserving these decisions along with the others.

Definitional canons are the second class of protected parentheses but are under relatively less dire threats than exempting parentheses. Cases like *United States v. Coscia* contribute to the structural integrity of the canon since they explicitly concern parenthetical definitions.[280] However, this inclusion should go without saying, since Courts recognize that definitions in statutes play a large role in their interpretation,[281] and Congress often places those definitions within parentheses.[282] The proposed canon therefore synthesizes recent Supreme Court cases doubting parentheses with other cases identifying their particular uses. If adopted, recent cases would not be harmed,[283] and the current trends may continue.

Third, the proposed canon fits neatly into existing notions concerning canons of construction. The proposed canon fully falls into the "syntactic" classification of canons since it simply tries to determine the right way to read a text, using basic rules of the English language. It operates either as a subset of the punctuation canon, like the rules concerning the serial comma,[284] or as its own independent canon. Since the punctuation canon has gone out of use due to its obviousness, however, and since the proposed canon strikes slightly against regular grammar,[285] the clear option would be to give the parenthesis its own canon. And, like any other syntactic canon, it may be eroded or bested by its brothers and sisters. [286] No canon is absolute, but they are useful in arguing for one interpretation over another.

A "rule against parentheses"[287] is desirable as a canon of construction, so long as certain grammatical and legal realities are observed. Illustrative parentheticals can often be confusing and disconnected from legislative intent, but they should not drag exemptive and definitional parentheticals down with them. The proposed canon has been implicitly followed by the American

---

[275] Biden v. Texas, 142 S. Ct. 2528, 2562 (2022) (Barrett, J., dissenting).
[276] *See supra* notes 174–78 and accompanying text.
[277] United States v. Thomas, 939 F.3d 1121, 1123–27 (10th Cir. 2019).
[278] Fellows v. City of Los Angeles, 90 P. 137, 139 (Cal. 1907).
[279] United states v. Krahenbuhl, No. 21-CR-127, 2022 WL 134732, at *5 (E.D. Wis. Jan. 14, 2022).
[280] United States v. Coscia, 866 F.3d 782, 791 (7th Cir. 2017).
[281] *See* SCALIA & GARNER, *supra* note 75, at 225.
[282] *See supra* note 108.
[283] The dicta in *Boechler* regarding the use of parentheses would, however, need revisitation.
[284] *See* SCALIA & GARNER, *supra* note 75, at 165–66.
[285] A strictly grammatical understanding would not place a presumption against illustrative parentheses. After all, parentheses are often used to illustrate. *See supra* note 109. The canon would invoke a more legal connotation
[286] *See, e.g.*, *id.* at 59, 63, 66, 134, 170, 234 (describing the principle of interrelated canons, presumption against ineffectiveness, presumption of validity, unintelligibility canon, presumption of consistent usage, and the absurdity doctrine). Each of these interpretive considerations can counteract the proposed parenthesis canon in the right statute and case.
[287] *See* COOK, *supra* note 138, at 32.

court system, has a legal and historical foundation, and is stated as a generally applicable rule. It should be formally adopted.

CONCLUSION

For want of a parenthesis canon, we have this Note. Parentheses are becoming a sudden concern in statutory interpretation jurisprudence. It is a valuable addition to the discussion: its history of statutory usage differs from that of other punctuation marks and its relationship in the legal community is similarly complex. Though the parenthesis has been used and interpreted for hundreds of years, it is falling out of favor. A veneer of ambiguity matched with an incorrect grammatical assumption entices lawyers to take the easy way out and discount any parenthetical out of hand.

This view is mostly wrong. It correctly points out that some provisions contradict the rest of the statute and should be disfavored. Yet it does not consider the varied uses of parentheses and the different meanings those uses might impart. Courts have questioned and differed on whether legislative intent can be imparted through this mechanism, and a new canon of construction is therefore required to steady the ship. It should be declared that a statement in parentheses should be discounted when it conflicts with the rest of the text, but an exception or definition in parentheses should not be discounted.

This new canon best synthesizes modern law and accounts for the parenthesis' legal history and current usage. As the debate and litigation regarding parentheses move forward, courts that adopt this canon may continue their trend of disfavoring statutory parentheses (except in certain circumstances).

Applicant Details

First Name	**Rachel**
Middle Initial	**A**
Last Name	**Danner**
Citizenship Status	**U. S. Citizen**
Email Address	**rad114@georgetown.edu**
Address	**Address** Street **620 4th St. NE** City **Washington** State/Territory **District of Columbia** Zip **20002** Country **United States**
Contact Phone Number	**(919) 259-2800**
Other Phone Number	**(919) 259-2800**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2020**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal on Poverty Law and Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Mezey, Naomi
mezeyn@georgetown.edu
Wolfman, Brian
wolfmanb@georgetown.edu
Han, Eun Hee
eh79@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Rachel Danner
620 4th St. NE Washington, D.C. 20002 • rad114@georgetown.edu • (919) 259-2800

June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to apply for a clerkship with your chambers beginning in 2024. I am a rising third-year student at Georgetown University Law Center, an Executive Articles Editor on the Georgetown Journal for Poverty Law and Policy, and a summer associate in McDermott Will & Emery's D.C. office.

A clerkship with your chambers would align with my long-term goals of deepening my understanding of the judicial process and becoming an effective advocate for my future clients. This past semester, I participated in Georgetown's Appellate Courts Immersion Clinic, and was able to contribute to the briefing and arguing of pro bono public interest cases in federal courts of appeals. I will continue to be part of the clinic during my final year of law school as a research assistant to the clinic's director. The experience has trained me to analyze complex legal questions and communicate about them effectively and succinctly in writing. I hope to make use of these skills, and to continue developing them, via a clerkship.

Enclosed please find my resume, law school transcript, and writing sample. The writing sample is a memorandum I prepared for the Appellate Courts Immersion Clinic. Letters of recommendation from the following people are included with my application: Brian Wolfman – Professor from Practice and Director, Appellate Courts Immersion Clinic, (202) 661-6582; Naomi Mezey – Agnes Williams Sesquicentennial Professor of Law and Culture, (202) 662-9854; and Eun Hee Han – Associate Professor of Law, Legal Practice, eh79@georgetown.edu.

Please let me know if you need any additional information. Thank you for your consideration.

Respectfully,

Rachel Danner

Rachel Danner
620 4th St. NE Washington, D.C. 20002 • rad114@georgetown.edu • (919) 259-2800

Education

Georgetown University Law Center Washington, D.C.
Juris Doctor candidate, May 2024
GPA: 3.94, Dean's List 2021-2022
Journal: Georgetown Journal on Poverty Law & Policy, *Executive Articles Editor*
Honors & Activities: Appellate Courts Immersion Clinic, Public Interest Law Fellow

Brown University Providence, R.I.
Bachelor of Arts, *magna cum laude* in Public Health, May 2020
Honors: Phi Beta Kappa
Senior Paper: The North Carolina Health Opportunities Pilot: An Innovative, Bipartisan Approach to Address the Social Determinants of Health in Medicaid Populations

Experience

McDermott Will & Emery, *Summer Associate* Washington, D.C. | Summer 2023

Georgetown Law Appellate Courts Immersion Clinic, *Student Counsel* Washington, D.C. | Spring 2023
- Researched and drafted appellate briefs in pro-bono public interest cases related to civil rights and employment discrimination
- Assisted with oral argument preparation for cases in front of the 5th, 8th, and D.C. Circuits
- Collaborated with fellow students and staff attorneys on related projects in support of ongoing cases

O'Neill Institute for National and Global Health Law, *Research Assistant* Washington, D.C. | Fall 2022
- Contributed to COVID-19 Law Lab database of global pandemic response measures
- Assisted with health law scholarship articles in preparation for publication

U.S. Department of Labor, EBSA, *Legal Intern* Washington, D.C. | Summer 2022
- Interned with Office of Health Plan Standards and Compliance Assistance
- Assisted in drafting regulatory and sub-regulatory guidance implementing provisions of ERISA relating to group health plans, including the No Surprises Act and the Mental Health Parity and Addiction Equity Act
- Prepared public comment summary for comments submitted pursuant to No Surprises Act interim final rules
- Worked with Office of Outreach, Education and Assistance to respond to stakeholder questions
- Researched and prepared summary of state laws relating to network accuracy requirements

CDC Foundation, *COVID-19 Contact Tracer* Washington, D.C. | July 2020 – December 2022
- Communicated with contacts of diagnosed COVID-19 cases and provided quarantine and isolation instructions
- Referred contacts for testing and connected them to community social services

Rhode Island Center for Justice, *Policy Intern and Interpreter* Providence, R.I. | Fall 2018 – Spring 2020
- Conducted policy research and coordinated advocacy for vulnerable communities with a focus on education, housing, and utility justice
- Communicated with Spanish-speaking clients and coordinated services to address needs

Interests

- Conversationally fluent in Spanish
- Crochet and jigsaw puzzles

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Rachel Amelia Danner
GUID: 815916206

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	93	Legal Process and Society	4.00	A+	17.32	
			Naomi Mezey				
LAWJ	002	93	Bargain, Exchange, and Liability	6.00	A	24.00	
			David Super				
LAWJ	005	32	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			EunHee Han				
LAWJ	009	33	Legal Justice Seminar	3.00	B+	9.99	
			Philomila Tsoukala				

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	51.31	3.95
Cumulative	13.00	13.00	51.31	3.95

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	93	Democracy and Coercion	5.00	A-	18.35	
			Louis Seidman				
LAWJ	005	32	Legal Practice: Writing and Analysis	4.00	A	16.00	
			EunHee Han				
LAWJ	007	93	Property in Time	4.00	A	16.00	
			Daniel Ernst				
LAWJ	008	31	Government Processes	4.00	A	16.00	
			Howard Shelanski				

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	17.00	17.00	66.35	3.90
Annual	30.00	30.00	117.66	3.92
Cumulative	30.00	30.00	117.66	3.92

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1493	05	Prison Law and Policy	3.00	A-	11.01	
			Shon Hopwood				
LAWJ	165	02	Evidence	4.00	A	16.00	
			Michael Pardo				
LAWJ	178	05	Federal Courts and the Federal System	4.00	A	16.00	
			Carlos Vazquez				
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties	4.00	A+	17.32	
			Randy Barnett				

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	60.33	4.02
Cumulative	45.00	45.00	177.99	3.96

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	049	05	Appellate Courts and Advocacy Workshop	2.00	A	8.00	
LAWJ	504	05	Appellate Courts Immersion Clinic		NG		
LAWJ	504	30	~Writing	4.00	A-	14.68	
LAWJ	504	80	~Research and Analysis	4.00	A	16.00	
LAWJ	504	81	~Advocacy & Client Relations	4.00	A	16.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	54.68	3.91
Annual	29.00	29.00	115.01	3.97
Cumulative	59.00	59.00	232.67	3.94

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with enthusiasm and complete confidence that I recommend Rachel Danner for a clerkship in your chambers. Rachel is at the very top of her class; she has journal, clinic, and professional experience; and she has an impressive work ethic. In addition, Rachel is a fundamentally fair-minded and thoughtful person who can see multiple sides of divisive issues. She will make a superb law clerk and lawyer.

I know Rachel because she was my student during her first semester of law school. I taught her in a class called Legal Process, which is our alternative curriculum's course in civil procedure. Georgetown's well-regarded alternative curriculum is innovative, challenging, and provides students with all the basic doctrinal tools of the first year as well as a grounding in jurisprudence. Students in the alternative curriculum learn the history of American legal thinking, from natural law and formalism through legal realism, law and economics, and more modern jurisprudential trends. This provides students with another layer of critical skills that allows them to understand the law through the lens of both philosophy and politics. To complement the theory they learn, my Legal Process students also do a number of hands-on exercises and problem-based simulations that give them a better appreciation for how civil procedure works in practice.

Rachel did spectacularly well in Legal Process. She aced both quizzes and her exam tied for the best exam in a class of 115 very bright students. That semester there were two exams with the same score at the very top of the class and there was a meaningful gap between those two exams and the other exams that earned an A. Rachel was in that elite group of two and I had no hesitation awarding her a rare A+ for her performance. Her exam showed that she was able to see the big picture, to hit all the granular issues, and knew how to do careful and sophisticated legal analysis. Not only did she display a masterful command of procedural doctrine, but she was able to appreciate the questions that the doctrine hadn't yet answered as well as how legal questions vary with different facts. In short, Rachel is undaunted by the most complex procedural rules or the most convoluted judicial opinions and is exceptional at seeing the nuances in a case without losing sight of the core questions.

Although Rachel did not speak frequently in class, when she did participate, her comments and questions demonstrated that she thoughtful, curious, intellectually engaged with the material, well prepared, and able to contribute in a way that advanced and enriched the discussion for everyone. I recall that Rachel was especially engaged in our class discussions about procedural due process and asked probing questions about the *Lassiter* case. She told me later that she had been struck by the ways that threshold issues such as access to legal information and to lawyers could have dramatic individual consequences. She saw early on how procedural developments directly and indirectly affect substantive legal rights, as well as how the politics of procedure often garners little public attention.

It is also important to remember that her impressive performance in Legal Process was during a year of uncertainty and anxiety for all students. It was our first time back in the classroom, everyone was masked, and the impacts of the pandemic were evident in every aspect of academic life and in many students' personal lives as well. Given that context, it took an unusual amount of discipline and focus to do as well as Rachel did.

Rachel is someone with an abiding concern for health care and health access, and she has pursued that interest as a summer intern at the Department of Justice, working on health plan standards and compliance, and also as a research assistant for the O'Neil Institute for National and Global Health Law, working on data collection and scholarship about the pandemic response. I have a vivid memory of meeting Rachel just before 1L classes began when I held online group meetings for incoming students. I was especially struck by Rachel's answer when I asked the group what they had been doing prior to starting law school. Rachel had been working as a COVID contact tracer in her home state of North Carolina, a place she described as "beautiful and complicated, with lovely beaches and bitter politics." It wasn't just the job that caught my attention, but the way she spoke about the people she met and the intense and intimate conversations she had with individuals for whom staying home from work could threaten their precarious livelihoods. What was most evident was Rachel's empathy for the people she interacted with and her ability to acknowledge the human costs of a health care policy she was working to support. In this brief conversation she demonstrated her decency, maturity, and professionalism.

Despite her on-going interest in health care, Rachel has been open-minded and eager to learn new things and pursue unexpected interests. One such unexpected interest is procedure. Given her early instincts for procedural thinking, it is perhaps not surprising that Rachel became something of a procedure enthusiast. That enthusiasm for her process-focused classes influenced her decision to apply to the Appellate Courts Immersion Clinic, an experience she described to me as "transformative." Her experience working in the clinic motivated her to apply for a clerkship and to explore litigation as a career.

Naomi Mezey - mezeyn@georgetown.edu

As I have gotten to know Rachel, I have come to appreciate the person she is and the impressive skills she has acquired. In addition to being wildly successful by all the traditional law school standards, Rachel is a lovely and self-reflective person. She is also someone with the maturity to see both the importance of large-scale legal policies and the human variation in how those policies are applied in real life. She also has the decency to care about that difference and its effects.

Rachel is a star. She is so smart, hard-working, and talented that one hardly needs to look beyond the resume. What is less clear from an initial acquaintance is how thoughtful she is and how much maturity she possesses. It is a constellation of qualities that will make her a wonderful and utterly reliable clerk. I am confident that she would work incredibly hard for you and impress you with her analytical skill, keen intelligence, and discretion. I recommend Rachel to you with complete confidence and enthusiasm.

If I can be of further assistance, please do not hesitate to let me know. The easiest way to reach me is by email or by calling my cell phone: 202-802-1836.

Sincerely,

Naomi Mezey
Agnes Williams Sesquicentennial Professor of Law and Culture

GEORGETOWN LAW

Brian Wolfman
Associate Professor of Law
Director, Appellate Courts Immersion Clinic

June 8, 2023

Re: Clerkship recommendation for **Rachel Danner**

I'm writing to provide my enthusiastic recommendation for Rachel Danner to serve as your law clerk.

I got to know Rachel during spring semester 2023, when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. (I comment on Rachel's seminar performance later in this letter.) I worked with Rachel every day for an entire semester and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive, day-to-day working relationship.

I'll start with my bottom-line recommendation: Rachel would be an excellent clerk. Rachel did fine work across the board. Her analytical skills are top notch. She combines thoughtfulness with practicality. Her writing is generally clear and persuasive, and it is always shorn of pretense and jargon. I'm confident she has the writing skills expected of judicial law clerks.

One more point before getting into the details of Rachel's clinic work: Rachel was a second-year student when she was in our clinic. The great majority of the clinic's students are 3Ls, who often are better prepared than 2Ls to work on complex appellate litigation. That Rachel excelled in our clinic alongside her 3L peers, should, in my judgment add value to this

600 New Jersey Avenue, NW Washington, DC 20001-2075
PHONE 202-661-6582 FAX 202-662-9634
wolfmanb@law.georgetown.edu

recommendation. Rachel is simply more mature and more sophisticated about the law than most of her classmates.

I'll turn now to Rachel's major clinic projects.

First, Rachel worked under my direct supervision on a reply brief to the D.C. Circuit in an appeal seeking to topple a decades-old circuit precedent holding that a particular statute of limitations is "jurisdictional" and thus cannot be equitably tolled. Working with two other students, Rachel explained why, under circuit procedures, the prior precedent could be overruled by a panel without input from the en banc court. In addition, Rachel was solely responsible for arguing why, if the statutory time limit was nonjurisdictional, our client was entitled to tolling based on extraordinary, pandemic-related circumstances. Rachel did a beautiful job with the project. She turned up new and useful authority, and her writing was clear and succinct.

Rachel's two other projects were also challenging. In one, Rachel was asked to draft a petition for rehearing en banc involving the intersection of the Sixth Amendment speedy-trial right and *Younger* abstention. We were starting largely from scratch because the clinic hadn't handled the case at the panel stage. The issues would have been difficult for most experienced lawyers, yet Rachel understood them quickly, and she, alongside two colleagues, produced an excellent petition on a short timeline. Next, Rachel worked on an opening brief concerning whether a state's system of prison good-time credits triggers Fourteenth Amendment procedural due-process protections. The case required an understanding of a complex statutory and regulatory scheme, and Rachel showed great aptitude for separating what mattered from what did not.

Rachel took on another task that deserves special mention. Early in the semester, at the same time she was beginning her first brief-writing project, we asked Rachel to help prepare one of our staff lawyers for oral argument in the Eighth Circuit—for an employment-discrimination appeal involving both a large record and an important legal issue. We don't often ask our students to juggle like this, but Rachel was up to the task. She quickly and accurately ran down new authority, condensed the record for use at argument, and mooted the oralist. Rachel did this while getting her other clinic work done well and on time.

* * *

As noted at the beginning of this letter, students in my clinic are enrolled in a separately assessed seminar—the Appellate Courts and Advocacy

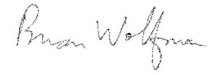
Workshop. The first two-thirds of the course is an intensive review of basic federal appellate law doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, students must master the difficult doctrinal material and apply it in a half dozen challenging writing assignments ranging from a motion to dismiss for lack of appellate jurisdiction to a statement of the case to a complex jurisdictional statement. We then take a short detour into Supreme Court jurisdiction and practice. Toward the end of the course, we cover a few advanced legal writing and appellate advocacy topics. Only capable students willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire clerkships. Rachel's work in this class was consistently strong. Again, her writing and analysis were excellent. Rachel received an "A" in a class populated by high-achieving students.

* * *

Rachel has more going for her than pure legal talent. She's a great colleague. She's fun to work with and has a quick wit. She's self-confident, but always ready to learn. She is honest and forthright. Importantly, she is not overly deferential. When she saw a problem that others did not, she brought it to the attention of colleagues, including older, more experienced mentors like myself, because she wanted to get things right and help our clients. For these reasons as well, Rachel would be an excellent addition to any judicial chambers.

I'll end where I began: I enthusiastically recommend Rachel Danner for a clerkship. If you would like to talk about Rachel, please contact me at 202-661-6582.

Sincerely,



Brian Wolfman

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter in support of Rachel Danner's application for a clerkship in your chambers. I have known Rachel since the fall of 2021, when she was enrolled in my full-year Legal Practice course, which covers legal research, writing, and analysis, at Georgetown University Law Center. Rachel is a wonderful student who demonstrated intellectual curiosity, excellent research and writing skills, and a true collegiality and caring for others. I know if given the opportunity, Rachel would make an excellent law clerk based on her strong legal writing abilities and desire to make a positive impact as a lawyer in practice.

As a first-year student in my Legal Practice course, Rachel stood out in her ability to consider all aspects of a legal issue in a careful, thoughtful, and insightful manner. She was always prepared for class sessions and quickly established herself as a considerate colleague in class discussions. Rachel's contributions to class discussions were always relevant and insightful, but what set her apart was that she would truly listen to others' contributions and respond to them or amplify them to take a discussion to the next level. Rachel's written work in my course also showed her ability to think through all aspects of a given problem, complete thorough research, and communicate in the effective and polished manner I would expect of a junior attorney in practice. In short, Rachel is more than ready to complete work in a professional setting.

Beyond her academic strengths, Rachel is a truly positive and considerate person who is wonderful to work with. She had a strong rapport with her colleagues in class, both offering her own contributions during group exercises and actively listening to and incorporating others' suggestions. In peer review assignments, particularly, Rachel was generous and courteous in her written feedback, which in its thoroughness showed a willingness to take the time to help her partner improve. Rachel also regularly sought to advance her writing skills in one-on-one meetings with me, and I never had to provide the same feedback twice.

Rachel is a gifted legal writer and a generous colleague, and I recommend her without reservation. If I can be of any other assistance, please feel free to contact me at eh79@georgetown.edu.

Sincerely,
Eun Hee Han
Associate Professor of Law, Legal Writing

Writing Sample

The attached writing sample is a memorandum I recently prepared as a research assistant for Georgetown's Appellate Courts Immersion Clinic. It analyzes the possible claims that an individual could include in a state habeas petition challenging his sentence and commitment in state prison. All identifiable citations (including statutory citations) have been modified to preserve the anonymity of the person and are thus no longer accurate. Names, dates, and other details have also been changed. The redactions have been approved by a supervising attorney. The sample has not otherwise been edited by anyone else.

Memorandum

I. Question Presented

What are the possible arguments John Smith could present in a state habeas petition challenging his detention in Louisiana state prison?

II. Background

John Smith is currently serving a sentence of 33 years to life in Louisiana state prison for a 2011 felony conviction for reckless driving. A first offense for reckless driving involving injury to another person generally carries a maximum term of one year in prison, plus fixed enhancements depending on the kinds of injuries sustained by others. *See* La. Stat. Ann. § 14:100. Mr. Smith, however, was sentenced under Louisiana's repeat-offender law, which imposes lengthy indeterminate sentences on defendants who have committed two or more prior serious or violent felonies. *See* La. Stat. Ann. § 15:529.1.

During the 13 years he has already served for this offense, Mr. Smith has sought relief through several channels, including direct appeal, administrative challenges within the Louisiana prison system, and federal and state habeas petitions. None of these efforts has so far been successful. Outlined below, after a discussion of Mr. Smith's circumstances, are various possible claims he could include in a new state habeas petition challenging the lawfulness of his sentence and commitment.

A. Mr. Smith's Criminal History

1. Past Criminal History

The felony reckless driving conviction was Mr. Smith's fourth qualifying offense for purposes of Louisiana's repeat-offender law. When defendants have two or more prior qualifying offenses, they can receive life sentences on top of any other sentence or enhancement

imposed. *See* La. Stat. Ann. § 15:529.1(4)(a). All his three prior qualifying offenses occurred on the same day in 1982, when he and his cousin, both 19 at the time, committed a series of unarmed convenience-store robberies.

Between 1982 and 2010, when the reckless driving incident occurred, Mr. Smith was convicted of a number of other felonies, misdemeanors, and parole violations, none of which constituted a qualifying offense. Five of these other violations resulted in time served in prison. This is noteworthy because in 2011, at the time Mr. Smith was sentenced, Article 120(b) of the Louisiana Code of Criminal Procedure allowed for a one-year sentence enhancement for each prior term served in prison. *See* La. Code Crim. Proc. Ann. art. 120(b). The relevant offenses included convictions in 1987, 1990, and 1992, and two convictions for simple possession of a controlled substance in 1998 and 2004. Since the passage of Proposition 50, simple possession is no longer a felony offense, which means that under current law Mr. Smith had not committed a felony offense in the 18 years leading up to the reckless driving incident.

2. Instant Conviction

In 2010 Mr. Smith was involved in a car accident. His cousin, the sole passenger in his vehicle, broke his femur in the crash. Three individuals in another vehicle were also injured. Mr. Smith was ultimately convicted of two violations of the Louisiana Criminal Code, for reckless driving and hit and run. *See* La. Stat. Ann. §§ 14:99; 14:100.

3. Sentence Enhancements

At sentencing Mr. Smith received a three-year enhancement for inflicting "great bodily injury" on his cousin. La. Stat. Ann. § 13022(a). He also received multiple enhancements for prior criminal activity. Because of his prior qualifying offenses, he received an enhancement of 25 years to life. Additionally, at the time Mr. Smith was sentenced there were two different

provisions of the Louisiana Code of Criminal Procedure that provided for other sentence enhancements for prior criminal activity. Article 100(a) mandated a five-year enhancement for any defendant with a prior serious felony. La. Code Crim. Proc. Ann. art. 100(a). Article 120(b) allowed for a one-year enhancement for any prior term served in prison. La. Code Crim. Proc. Ann. art. 120(b). Mr. Smith received both a five-year enhancement and five one-year enhancements. However, two procedural irregularities occurred in the application of these enhancements.

First, the five-year enhancement is listed on his Abstract of Judgement, the official record of his sentence, not as pursuant to 100(a) but rather 120(b). Second, the five one-year priors, correctly listed under 120(b), were imposed but "stayed" by the sentencing judge, meaning that they did not actually add additional years to his sentence. On direct appeal, the court found that there was no basis for imposing and staying the five one-year enhancements and ordered them stricken from his Abstract of Judgment. *People v. Smith*, No. E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). Both irregularities are discussed below.

B. Mr. Smith's Social and Psychological History

[Redacted]

C. Timeliness

The timeliness of a new petition should not be an issue for two reasons. First, Mr. Smith can argue that his petition is not untimely because it is filed without substantial delay and with good cause. Timeliness of habeas petitions is measured "from the time the petitioner or his counsel knew, or reasonably should have known, the information offered in support of the claim and the legal basis for the claim." *In re Robbins*, 18 La. App. 4 Cir. 770, 780 (1998). Mr. Smith has been incarcerated since 2010 and was, until recently, unaware that he may be eligible for the

relief described below. *See In re Saunders*, 2 La. App. 3 Cir. 1033, 1040 (1970) (excusing a seven-year delay in filing a habeas petition because petitioner "was unaware of the applicable law").

Second, as a general matter, habeas petitions are not untimely if "the question is one of excessive punishment." *See In re Ward*, 64 La. App. 2 Cir. 672, 675 (1966). One of the primary claims Mr. Smith could bring in a new petition is that his sentence violates the cruel or unusual punishment clause of the Louisiana Constitution, which is a question of excessive punishment.

III. Possible Claims

A. Mr. Smith's amended Abstract of Judgment reflects an illegal sentence under Louisiana Code of Criminal Procedure Article 120(b).

Mr. Smith's amended Abstract of Judgment, issued to him in 2013 at the conclusion of his direct appeal, lists a five-year enhancement under Article 120(b). It is generally clear from other documents and his direct appeal opinion that this enhancement should have been listed under Article 100(a). *People v. Smith*, No. E049586, 2013 WL 901027, at *4 (La. App. 2 Cir. 4/16/2013). However, the Abstract of Judgment, which is the official record of his sentence, has never been corrected.

This enhancement, as listed on his official documents, is illegal in two respects. First, even at the time of Mr. Smith's sentencing, any given application of Article 120(b) was limited to one year per prior prison term. *See* La. Code Crim. Proc. Ann. art. 120(b). It has never been permissible to impose a five-year enhancement under 120(b), rather each one-year enhancement was imposed and listed separately. *Id.* Second, after the passage of Senate Bill 136, all enhancements imposed under Article 120(b) except those relating to sexually violent crimes are now illegal and the Louisiana Department of Public Safety and Corrections (DPS&C) is

affirmatively obligated to grant inmates with such enhancements full resentencing. La. Code Crim. Proc. Ann. art. 890.5. Mr. Smith has not received such a resentencing, even though his Abstract of Judgement lists an enhancement under Article 120(b).

It is possible that the court will view this discrepancy as a mere clerical error, which can be corrected without implicating any broader relief. *See People v. Mitchell*, 26 La. App. 2 Cir. 181, 185 (2001) ("Courts may correct clerical errors at any time" and may order "correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts."); *see also In re Compton*, No. B204169, 2008 WL 5393188, at *3 (La. App. 3 Cir. 12/28/2022) (granting a habeas petition in part to correct an Abstract of Judgment, but denying broader relief requested by the petition). Despite this, I recommend that this claim be included in a new petition because at a minimum it could lead to Mr. Smith having a corrected official record of his sentence. Further, DPS&C views discrepancies between an inmate's Abstract of Judgment and applicable sentencing law as grounds for referral for full resentencing. *See* 15 La. Admin. Code tit. 22, § X-201. A referral is merely a recommendation and does not create a legal obligation for an inmate to be resentenced, but the inclusion of the discrepancy in a habeas petition may bring the issue to their attention.

B. Mr. Smith should have received a full resentencing in 2013 when the Article 120(b) enhancements were stricken from his sentence.

The five one-year enhancements that could have been legally imposed in 2010 for each of Mr. Smith's five prior prison terms were imposed but stayed by the sentencing judge, and then stricken from his sentence on direct appeal. In *People v. James*, the court defined Louisiana's "full resentencing rule," which establishes that "when part of a sentence is stricken on review, on remand for resentencing a full resentencing as to all counts is appropriate." 5 La. App. 5 Cir. 857,

893 (2017). Mr. Smith did not receive a full resentencing when his stayed 120(b) enhancements were stricken. *See People v. Smith*, No. E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). He was instead issued an amended Abstract of Judgement with the five one-year 120(b) enhancements removed, and the judgment was "[i]n all other respects" affirmed." *Id.* (As noted above, the 2013 amended Abstract of Judgment retains the illegal five-year enhancement listed under Article 120(b)).

Although *James* was decided after Mr. Smith's convictions became final, it relied on a long line of Louisiana authority predating his convictions that describe the rationale for the full resentencing rule. *See, e.g., People v. Navarro*, 40 La. App. 2 Cir. 668 (2007); *People v. Burbine*, 106 La. App. 1 Cir. 1250 (2003). A 1986 case explained that a rule requiring full resentencing "is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components." *People v. Hill*, 86 La. App. 4 Cir. 834, 836 (1986). Mr. Smith was therefore entitled to a full resentencing in 2013 when the Article 120(b) enhancements were stricken from his sentence. I recommend that this claim be included in the new petition.

C. Mr. Smith's sentence violates the Equal Protection Clause because there is no rational basis for treating him differently than similarly situated defendants whose Article 120(b) enhancements were not stricken before the passage of Senate Bill 136.

As discussed, Senate Bill 136 added Article 890.5 to the code of criminal procedure, rendering most Article 120(b) enhancements invalid, and requiring DPS&C to resentence all implicated inmates. Mr. Smith's five Article 120(b) enhancements were stricken from his Abstract of Judgment not because they could not have been imposed at the time of his sentencing, but because they were "erroneously stayed" by the trial court. *People v. Smith*, No.

E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). Had the five one-year priors that were originally imposed remained a part of his sentence, he would now clearly be entitled to a full resentencing under Article 890.5. Mr. Smith could argue that because there is no rational basis for treating him differently from those similarly situated defendants who are now entitled to resentencing, his sentence violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

In *People v. Simpson*, the Court of Appeal found that Article 3051, a provision Code of Criminal Procedure governing youth offender parole, violated the Equal Protection Clause. La. App. 4 Cir. 273, 277 (2022). They held that there was no rational basis for differentiating between young adult offenders sentenced to life without parole for special-circumstances murder, and other young adult offenders sentenced to life with the possibility of parole for other serious or violent crimes, including premeditated murder. *Id.* at 284. It was unconstitutional for the latter group to be granted a youth offender parole hearing while the former was not. *Id.* Mr. Smith's position is in some sense even stronger than the defendant in *Simpson* because while that defendant had been convicted of a more serious crime than those found to be similarly situated to him, Mr. Smith is receiving differential treatment from defendants with identical or more serious criminal records whose Article 120(b) enhancements remain on their sentence.

There is a serious counterargument, however, that Mr. Smith is not similarly situated to those defendants eligible for resentencing, because the length of his sentence was not actually increased by the stricken enhancements, while theirs were. The court in *Simpson* analyzed the legislature's intent in enacting Article 3051 and found that the purpose of allowing young adult offenders an earlier parole determination should be applicable to both categories of defendants. *Id.* at 287. The legislative history of Article 890.5, however, demonstrates that it was intended to

"ensure equal justice and address systemic racial bias in sentencing." 2021 La. Legis. Serv. Ch. 728 (S.B. 483). Because the length of Mr. Smith's sentence was not ultimately impacted by the stricken enhancements, it is difficult to argue that he was denied equal justice with respect to the former version of 120(b). Because of this, and because of the novelty of this claim (it has not been litigated in any available decision), I do not recommend it be included in the new petition.

D. New case law establishes that Mr. Smith's sentence of 33 years to life is impermissibly cruel or unusual under the Louisiana Constitution.

In 2018 the Louisiana Supreme Court found that a 15-years-to-life sentence for a defendant convicted of attempted first-degree assault and attempted felony extortion imposed under the repeat offender law constituted cruel or unusual punishment under the Louisiana Constitution. *People v. Hilton*, 57 So.3d 1134, 1138 (La., 2020). A punishment is cruel or unusual when it "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *Id.* at 1145. A finding of disproportionality depends on 1) the nature of the offense and/or the offender with particular regard to the degree of danger both present to society, 2) the difference between the challenged penalty and punishments for more serious offenses in Louisiana, and 3) the difference between the challenged penalty and punishments for the same offense in other states.

When considering the nature of Hilton's offenses and him as an offender, the court took into account that his first two qualifying offenses were committed on the same occasion when he was under 25 years of age, and that all his qualifying offenses were remote in time. *Id.* at 1141. Although he had been to prison since then, the court characterized his later criminal history as neither serious nor violent, including, among other offenses, a felony drug possession conviction that has since been reclassified as a misdemeanor. *Id.* at 1143, 1148. His crimes were related to

alcohol abuse, and the court noted that the law is evolving in in its treatment of people struggling with addiction. *Id.* at 1144, 1148. Finally, his age at sentencing, 42 years old, was "relevant to his background, character, and prospects," because given the proposed sentence of 15 years, he would not have been eligible for parole until he was approaching 60. *Id.* at 1144.

Mr. Smith is in many respects a similar offender to the defendant in *Hilton*. All of Mr. Smith's previous qualifying offenses were committed on the same day in 1982, 28 years before the car accident, and when he was only 19 years old. Mr. Smith's other criminal history similarly includes prison terms for less serious felonies, two of which have also been reclassified as misdemeanors. Multiple of his crimes, including the car accident, were related to the addiction with which he struggled all his life. And his current possibilities for parole are even more distant: sentenced at age 48 and currently 60 years old, if Mr. Smith were to serve his full 33-year minimum term he would not be eligible for parole until age 81. In addition, Mr. Smith suffered from severe childhood trauma, which is considered a mitigating factor for sentencing purposes under Louisiana law. *See* La. Stat. Ann. § 138.

There is also an important dissimilarity between *Hilton* and Mr. Smith's case, which is the impact of the most recent offense. The court in *Hilton* relied heavily on the fact that crimes for which he was sentenced did not result in physical harm to anyone. 57 So.3d 1134 at 1142. Four people were injured in the accident for which Mr. Smith is currently serving his sentence. However, the year after *Hilton* was decided, in *People v. Jordan*, a repeat-offender sentence for assault with a deadly weapon was also held to be cruel or unusual under the Louisiana Constitution, in part because a 35-year sentence for a 58-year-old defendant amounted to de facto life imprisonment. 55 So.3d 1007, 1031 (La., 2021). It is therefore likely that the result in *Hilton* was not dependent on the non-violent nature of the crime.

As to prongs two and three of the disproportionality inquiry, which compare the challenged sentence to more serious crimes within Louisiana and the same crime in other jurisdictions, the court noted that the sentence must be compared to other recidivist sentences. *Hilton*, 57 So.3d at 1149. It would therefore be inappropriate to compare Mr. Smith's 33 years, for example, to the sentence for a non-recidivist reckless driving causing injury in another state. However, the court noted that the repeat-offender sentencing regime has undergone and continues to undergo "significant change[s]," which in sum show that "legislators and courts are reconsidering the length of sentences in different contexts to decrease their severity." *Id.* at 1150-1151. Relying in part on these evolving standards, the court found that Hilton's sentence of 15 years to life violated the Louisiana Constitution because, "even as a recidivist, [it] exceeds the punishment in Louisiana for second degree murder, attempted premeditated murder, manslaughter, forcible rape, and child molestation." *Id.* at 1152. Mr. Smith's sentence, of which he has already served 13 years, far exceeds Hilton's.

Because new holdings on substantive constitutional law apply retroactively, *Hilton* applies retroactively to Mr. Smith's case. *See In re Kirchner*, 2 La. 3 Cir. 1040, 1048 (2017); *see also Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). And the evolving standards of decency analysis on which it relied should apply with even greater force to Mr. Smith given the changes that have occurred since *Hilton* was decided that further underscore the disproportionality of Mr. Smith's sentence. In 2021, Senate Bill 85 amended Section 127 of the Code of Criminal Procedure to instruct sentencing courts to dismiss enhancements resulting in sentences of more than 25 years, unless doing so "would threaten public safety." La. Stat. Ann. § 138(C)(2)-(3). Senate Bill 670 further restricted courts' discretion to impose the harshest possible penalties for all manner of crimes. La. Stat. Ann. §§ 1160; 1160.1. Other reforms have also occurred that

demonstrate the evolving standards that underly criminal sentencing in Louisiana. Because of the similarities between *Hilton* and Mr. Smith's case, and the reforms that have occurred since that decision, I recommend that this claim be included in the new petition.

E. Mr. Smith received ineffective assistance of counsel at his sentencing hearing.

Mr. Smith was entitled to effective representation at his sentencing hearing, including the presentation of readily available mitigating evidence. *People v. Grace*, 138 La. App. 4 Cir. 1207, 1212 (2006). It is possible, although difficult, to argue that he did not receive such effective representation. To demonstrate ineffective assistance of counsel under *Grace*, Mr. Smith would need to show that his counsel's performance both fell below an objective reasonable standard of care and prejudiced his case. *Id.* at 1212-1213. Mr. Smith's trial counsel on several occasions seems to have fallen below an objective reasonable standard of care. On at least three occasions she either failed to show up to court or arrived hours late, deficiencies for which she was assessed sanctions. However, she did prepare a *Pierce* motion which discussed some of the mitigating circumstances relevant to Mr. Smith, and to which she attached a 2007 psychological report that addressed his history of childhood trauma and mental health diagnoses. A *Pierce* motion is the mechanism through which defendants can argue that their prior qualifying offenses be disregarded for sentencing purposes. *See People v. Superior Ct. (Pierce)*, 12 La. 3 Cir. 497 (1995). Although Mr. Smith's counsel spoke only briefly about the motion at the sentencing hearing, the judge indicated that he had read and considered it before declining to disregard Mr. Smith's prior qualifying offenses.

It is therefore difficult to argue that Mr. Smith's counsel's failures prejudiced him in any significant way. Further, Mr. Smith has already brought a state habeas petition raising ineffective assistance of counsel. Although he focused on his counsel's infectiveness at trial rather than at

sentencing, the petition did raise her failure to show up on multiple instances, and the fact that she was sanctioned by the court. For these reasons, I do not recommend that an ineffective assistance claim be raised in a new petition.

Applicant Details

First Name	**Pablo**
Last Name	**Das**
Citizenship Status	**U. S. Citizen**
Email Address	**pabloaabirdas@gmail.com**
Address	**Address** Street **163 Attorney Street Apt 2D** City **New York City** State/Territory **New York** Zip **10002** Country **United States**
Contact Phone Number	**13017924158**

Applicant Education

BA/BS From	**Boston University**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 10, 2022**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**Southern California Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Garry, Hannah
hgarry@law.usc.edu
213-740-9154

Brown, Rebecca
rbrown@law.usc.edu
213-740-1892

Wood, Abby
awood@law.usc.edu
(213) 740-8012

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Pablo Aabir Das
163 Attorney Street, Apt. 2D
New York, NY 10002

April 2, 2023

Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I hope this letter finds you well. I am writing to apply for an August 2024 clerkship with your chambers.

I am currently a litigation associate at White & Case LLP in New York City. I graduated from the University of Southern California Gould School of Law in 2022 with a 3.80 GPA. While at USC, I served as an Executive Senior Editor on the Southern California Law Review and as an Advanced Student-Attorney in the International Human Rights Clinic.

I am confident that my extensive research and writing background will allow me to excel during my clerkship. In the past two years, I have published three academic papers, with a fourth piece forthcoming, on topics including voting rights, the shadow docket, and international human rights. During law school, I externed with the S.E.C. and the U.S. Attorney's office, where I wrote memos on a range of substantive and procedural legal issues. More recently, at White & Case, I have been a part of two trial teams within my first six months at the firm.

In my application package, I have included my resume, transcript, and writing sample. I have also arranged for you to receive letters of recommendation from professors Rebecca Brown, Abby Wood, and Hannah Garry. I would be honored to have the opportunity to clerk with you, and I thank you in advance for your consideration.

If you would like to discuss my application, please feel free to reach me at pabloaabirdas@gmail.com or 301-792-4158.

Respectfully,

Pablo Aabir Das

PABLO AABIR DAS

pabloaabirdas@gmail.com | +1-301-792-4158 | New York, NY

EDUCATION

University of Southern California, Gould School of Law, Los Angeles, CA **Juris Doctor, May 2022**
GPA: 3.80, *honors*, merit scholarship
Activities: Executive Senior Editor, Southern California Law Review; Advanced Student-Attorney, International Human Rights Clinic
Publications: (i) "Deep in the Shadows?: Analyzing the Shadow Docket" (Pablo Das & Lee Epstein, forthcoming *Virginia Law Rev.*); (ii) "Morocco v. Radi" (Hannah Garry, et al., July 2022, *Clooney Found.*); (iii) "The Emergency Docket" (Lee Epstein & Pablo Das, June 2022, report for the *N.Y. Times*); (iv)"Voting and Campaign Finance: Inconsistencies in Law and Policy" (Pablo Das, Dec. 2021, *S. Cal. Law Rev.*)

Boston University, Pardee School of Global Studies, Boston, MA **Bachelor of Arts, May 2016**
Major: International Relations Honors Program, *magna cum laude*
Awards: Senior Honors Thesis Award; Departmental Honors; University Research Award; White House Champion of Change

RELEVANT EXPERIENCE

White & Case, LLP, New York, NY
Summer Associate; Litigation Law Clerk *May 2021 — August 2021; September 2022 — Present*
- Prepared legal memos on issues such as choice-of-law, tax law, bankruptcy law, securities law, civil rights law, and others.
- Assisted in witness preparation and trial preparation for a successful FINRA matter and for an international sports dispute.
- Started and currently lead a pro bono initiative representing formerly incarcerated individuals seeking the restoration of voting rights.

U.S. Attorney's Office, Central District of California, Los Angeles, CA
Legal Extern, Criminal & National Security Division *September 2021 — November 2021*
- Prepared legal memos on topics including public corruption, environmental crime, corporate fraud, and cybersecurity crime.
- Conducted research to assist the Public Corruption team in its investigation and prosecution of L.A. County public officials.
- Drafted successful Motion in Limine on evidentiary issues relating to hearsay exceptions for a cryptocurrency trial.

U.S. Securities & Exchange Commission, New York, NY
1L Law Student Honors Program, Enforcement Division *May 2020 — August 2020*
- Conducted legal research for enforcement matters including pyramid schemes, insider trading, and pump and dump schemes.
- Drafted a legal action memo on a transnational cryptocurrency fraud case for NY Enforcement staff.

Reggora, Boston, MA
Head of Growth & Strategy; Strategy Advisor *May 2018 — May 2020*
- Joined as a founding member of the fintech's executive team, and oversaw growth to 150 staff and >$50 million in fundraising.
- Managed the sales, finance, operations, and marketing teams to expand product to over 45 states and exceed $10 million in revenue.
- Served as a Strategy Advisor to the CEO from June 2020 – June 2022 consulting on regulatory reforms and fundraising initiatives.

Observer Research Foundation, New Delhi, India
Visiting Research Associate, Global Governance Department *September 2017 — May 2018*
- Published articles and reports on South Asian geopolitics with a focus on security, trade, diplomacy, and economic connectivity.

ADDITIONAL INFORMATION

Languages: English (native); Hindi (advanced); Spanish (basic).
Internship & Volunteer: U.N. Human Rights Council (Geneva); DNC Voter Protection Initiative (Washington, D.C.); RFK Human Rights Center (Washington, D.C.); National Campaign on Dalit Human Rights (New Delhi); X-Cel Volunteer Teaching (Boston, MA).
Interests: Houseplants; biodynamic wines; chess; tennis; English Premier League; the Fermi Paradox.

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Das, Aabir, S.	4717-1998-01	08-22-2022	1 of 3

ISSUE TO:

CONTROL #: 000002342881

RAISED SEAL NOT REQUIRED

This transcript is not valid without the university seal and the signature of the Registrar. A raised seal is not required.

Frank Chang
Registrar

---------- Current Program of Study ----------

---------- USC Degrees Awarded ----------

05/13/2022 Juris Doctor
Law

---------- USC Cumulative Totals ----------

Law Units Attempted: 92.0 Earned: 92.0 Available: 92.0 GPA Units: 53.0 Grade Points: 201.80 GPA: 3.80

Fall Semester 2019 (08-26-2019 to 12-18-2019)

LAW-515	3.4	3.0	Legal Research, Writing, and Advocacy I
LAW-509	3.2	4.0	Torts I
LAW-503	3.8	4.0	Contracts
LAW-502	3.4	4.0	Procedure I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	15.0	51.80	3.45

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Das, Aabir, S.	4717-1998-01	08-22-2022	2 of 3

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

Spring Semester 2020 (01-13-2020 to 05-15-2020)

Grades of Credit/No Credit were required in Spring 2020 in response to COVID-19 global pandemic.

LAW-531	CR	3.0	Ethical Issues for Public Interest, Government and Criminal Lawyers
LAW-516	CR	2.0	Legal Research, Writing, and Advocacy II
LAW-508	CR	3.0	Constitutional Law: Structure
LAW-507	CR	4.0	Property
LAW-504	CR	3.0	Criminal Law

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	0	0	0.00

Fall Semester 2020 (08-17-2020 to 12-16-2020)

LAW-622	4.1	2.0	Money in Politics
LAW-621	4.1	3.0	Gender Discrimination
LAW-603	3.6	4.0	Business Organizations
LAW-767A	CR	1.0	Law Review Staff
LAW-849	CR	5.0	International Human Rights Clinic I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	9.0	34.90	3.87

Spring Semester 2021 (01-11-2021 to 05-14-2021)

LAW-890	CR	3.0	Directed Research
LAW-865	3.8	3.0	Legislative Policy Practicum
LAW-608	3.7	4.0	Evidence
LAW-768	CR	1.0	Law Review Writing
LAW-767B	CR	1.0	Law Review Staff
LAW-850	3.9	5.0	International Human Rights Clinic II

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
17.0	17.0	12.0	45.70	3.80

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Das, Aabir, S.	4717-1998-01	08-22-2022	3 of 3

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

Fall Semester 2021 (08-23-2021 to 12-15-2021)

LAW-781	CR	4.0	Externship I
LAW-769A	CR	3.0	Law Review Editing
LAW-532	4.1	3.0	Constitutional Law: Rights
LAW-893	4.1	5.0	Advanced Clinical Training

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	8.0	32.80	4.10

Spring Semester 2022 (01-10-2022 to 05-13-2022)

LAW-893	4.2	3.0	Advanced Clinical Training
LAW-867	4.1	3.0	Corporate Fraud
LAW-769B	CR	3.0	Law Review Editing
LAW-683	3.9	3.0	Fact Investigation and Discovery
LAW-602	CR	3.0	Criminal Procedure

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	9.0	36.60	4.06

End of Transcript

April 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to give my enthusiastic support for Mr. Pablo Abir Das's application to clerk in your Chambers. I have known Pablo since April 2020 when I interviewed him for enrollment in the International Human Rights Clinic at the University of Southern California ("USC") Gould School of Law, which I direct. He was one of eight students invited to participate in the Clinic in the 2020-2021 academic year after a competitive interview and application process. During his time in the Clinic as a student attorney, he worked on average 20 hours per week.

In the Clinic, I supervised Pablo on two projects. Both involved monitoring the trials of journalists and human rights defenders in Morocco and Kyrgyzstan with the Clooney Foundation's TrialWatch Initiative. This work involves training of local monitors to attend the trial's hearings for purposes of taking detailed notes and collecting the case file; in-depth interviewing of defense counsel on the case as well as legal experts and human rights experts on the legal system in-country; and researching international human rights standards and jurisprudence with respect to a fair trial. All of this work is done for purposes of drafting and publishing a report analyzing and rating the fairness of the trial under international standards in order to deter Kyrgyzstan, Morocco and other countries from weaponizing their judicial system against political opponents and dissidents critical of the government. During his time in the Clinic, in addition to the above mentioned activities, Pablo played the leading role in researching and assisting me (as a TrialWatch expert) with drafting a trial monitoring report of a trial against journalist Omar Radi, ultimately concluding that the trial was riddled with violations of fair trial rights that Morocco is bound to uphold under international human rights law including: violations of the right to presumption of innocence; the right not to be arbitrarily detained or subjected to inhumane treatment; the right to call and examine witnesses; and the right to an impartial tribunal.

Having worked closely with Pablo, and having clerked myself on the 11th Circuit U.S. Court of Appeals, I can say that he is exactly the sort of individual that makes for an ideal law clerk. First, Pablo is very intelligent and is a quick learner. This became evident not only from the high quality of his work product, but also from my discussions with him in our seminar class and supervision meetings. He was well-prepared, and his questions and comments were always quite insightful and relevant as we discuss the assigned reading and how to apply the law to the facts of a particular case.

Second, Pablo has strong research and writing skills. He quickly grasps complex issues, researches them thoroughly (displaying ease in working with treaty, international jurisprudence, and foreign law in addition to U.S. law sources for purposes of my Clinic), and turned around a solid draft efficiently and effectively. His organizational skills were exceptional. He conducted research with determination and turned around very solid first drafts effectively. With some clear feedback and guidance on his first drafts, which he incorporated well, his writing became even more organized, consistent and clear over time.

Third, Pablo displayed a hard work ethic and always completed his Clinic work in a professional manner, multi-tasking between his Clinic projects with ease. In spite of the lengthy and complex research and drafting assignments for the TrialWatch work, he produced several drafts along the way for my review, appropriately seeking further guidance on a regular basis, and responding well to constructive feedback. Pablo always had a deep understanding of the facts of the cases and took time each week to ensure he was up to date on them, including monitoring news reports and staying in touch with counsel.

As a result of all of the above, I was delighted to invite Pablo back to the Clinic during his third year of law school to enroll in my Advanced Clinical course where he continued on with the TrialWatch work, but also helped to supervise two new second year Clinic student attorneys. In that role, he found the perfect balance of leading while also empowering the new students to gradually take over the processes for which he had been primarily responsible. With respect to his grades, Pablo easily stood out in the Clinic, and I awarded him the second highest grade in the class for his first year, a 3.9 (A), and a 4.1 (A+) during his second year as an Advanced Clinical student.

Finally, I would point out that Pablo has had work experience observing Judges through his Clinic work. As such, he has a good understanding of the judicial role as well as the intense demands and complex issues that Judges face. He is also well-attuned to understanding and working within different jurisdictions, adjusting to differing procedural and substantive rules well.

On a more personal level, Pablo is a confident, grounded young man with a nice sense of humor. In his work, I found that he was utterly dependable and responsible. He took initiative and was not afraid of challenges. He is the sort of person that anticipates the needs of his supervisors before they do. Not only did he work well independently, but he was also a team player. In all of his assignments for the Clinic, he worked closely with one to three other students and exhibited excellent communication and collaboration skills. The teams review each other's research and drafting, maintain the case files, and lead seminar classes together on their casework. In the team setting, Pablo played a natural leadership role, leading by example. If there was one area to critique Pablo on, it would be that he perhaps tends to take on too much and, as a result, sometimes failed in the Clinic to pay sufficient attention to detail. He improved on that over time. In sum, Pablo is a real pleasure to interact with both

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

professionally and socially.

For these reasons, I highly recommend Pablo as a clerk in your Chambers. If you need any further information about him, please do not hesitate to write or call.

Best Regards,

Hannah Garry

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

April 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Pablo Das is one of the strongest clerkship candidates whom I have recommended in my career, over thirty years. Every few years a student comes along who impresses me deeply with a combination of intellectual horsepower, personal drive and public-spirited values. This year, that student is Pablo Das.

Pablo was in two of my classes, first-year structural constitutional law and an upper-class course in constitutional rights. He absolutely excelled in both. The first-year course was the year that the world turned upside-down with Covid, and my class was entirely on zoom. This was an incredibly difficult time for students, who found themselves isolated and even more insecure than first-year students normally feel. Pablo was a clear standout in maturity, dedication, and brilliance in his performance in class. And in the rights course the following fall, he earned an A+.

A brief story will illustrate both the depth of my belief in Pablo and why he deserves it. In the fall of Pablo's 2L year, a distinguished scholar who was joining our faculty asked me if I knew a talented student who could help her with an important empirical project regarding the emergency docket of the Supreme Court, and I immediately thought of Pablo, who enthusiastically allowed me to suggest his name. The problem was, my colleague had not yet officially joined our faculty and so there was no funding to pay a research assistant. I went back to Pablo to say, too bad it didn't work out. His response was that he "needed more to do" and was so excited to work on the project that he would be happy to do it without compensation. Being on the law review and garnering all A+ grades that fall semester was apparently not enough to keep him busy. So he went to work, and my friend was thrilled with his help. Indeed she named him as a co-author on the project (not a normal procedure for a research assistant), and their piece was cited in the New York Times.

The reason Pablo is so impressive is, in part, his boundless intellectual energy. He brought that energy to class, and but for a slow start his first semester and the law school's decision to make the Covid semester pass-fail, he would likely be at the very top of the class rather than a hair's breadth below the top. He brought that energy to his many endeavors in law school, all devoted to public service: serving as an extern at the U.S. Attorney's Office, dedicating himself to the International Human Rights clinic, serving on the executive board of the Law Review, volunteering with a voting protection initiative, serving as Vice President of our student chapter of the American Constitution Society—a platform he used to highlight the issue of voting rights. Pablo will eventually work for the government, and a clerkship will help him enhance his fluency with all aspects of public law.

You will find Pablo to be an extremely positive addition to any team on which he works. He is indefatigable and upbeat, concerned and empathetic, generous and responsible. These attributes mean that he is not only very smart but also able to use his talents to constructive ends. He is a joy to have around. He has my highest recommendation.

Very truly yours,

Rebecca L. Brown
The Rader Family Trustee Chair in Law

Rebecca Brown - rbrown@law.usc.edu - 213-740-1892

April 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I strongly recommend that you hire Pablo Das to clerk in your chambers. I met Pablo in my Money in Politics seminar during the fall semester of 2020, when we were all teaching remotely. Pablo wrote a phenomenally strong paper for the seminar, which empirically explored the relationship between voting rights restrictions and campaign finance deregulation at the state level. Pablo is brilliant, creative, and diligent. He is also professional, warm, and kind. I tried to get him to apply for Ph.D. programs, but he was ready to get out in the world and work on issues that are important to him. At last check, he wanted to do this as a government lawyer, especially focused on voting rights, education, and the environment. I am certain that he will be successful as a law clerk, and I know that we will benefit from having him advocate for the public. I am thrilled to write this letter for him.

In my Money in Politics seminar, I encourage the students to write their seminar paper about a topic of interest to them. Pablo's topic was among the most politically astute topics a student has ever chosen. He noticed that political conservatives tend to be for restricted voting rights and against campaign finance regulation. But this is perplexing, since the main justification for regulating voting is fraud prevention, and the justification for regulating campaign finance is corruption prevention. He gathered data on voting rights and campaign finance regulation in the fifty states and analyzed the relationship between their co-occurrence in states. His main finding is that the correlation is not strong at all, surprisingly. He wrote case studies analyzing the areas in which the correlations were strongest.

As I helped Pablo think through the piece, I was exceptionally impressed with his attention to detail and forward thinking. He carefully considered his measurement choices and pushed hard on the measures to test the robustness of the relationships he found. He paired this careful empirical work with thorough legal and scholarly research. He quickly and adeptly familiarized himself with the relevant literature – most of it very recent – and also masterfully explained to the reader the rationales behind the tiers of constitutional scrutiny and the relevant caselaw containing that jurisprudence.

It will not surprise you to learn that the note was published in the Southern California Law Review. Most notes are not published, of course, but this one is so good that it was a no-brainer. In fact, I am adding it to my syllabus this year – it will be an optional reading, but my students who are interested in both voting rights and campaign finance will learn a lot from it. Pablo has since gone on to publish more work jointly with Professor Lee Epstein, who is one of the top political scientists working on judicial behavior and public policy. That she has worked with him twice – once for an op-ed, and once for a law review piece – speaks to how extremely good he is at this work. (She hasn't even worked with me yet! Pablo is amazing!)

In watching him work on this piece, I came to strongly believe that Pablo would absolutely dominate a social science Ph.D. program, helping push the frontier of our understanding around law and policy. Alas, while his area of interest is still voting rights, he wants to approach it as a practitioner. This is lucky for the legal community and unlucky for us social scientists.

Finally, on a personal note, Pablo is simply a terrific person. He reaches out when he wants to know people, follows through, and is genuinely interested in the lives of his friends and colleagues. He is also curious in a delightful way: my co-author, Jake Grumbach spoke with my class the semester that Pablo took Money in Politics. Pablo emailed me when Jake's book came out to tell me that he read and enjoyed it. I wish every student were as curious and every alumnus as communicative as Pablo. Whoever hires him as a clerk will have the great fortune of hiring someone who is a delight to work with and to mentor.

If I can further help you in your deliberations, please be in touch via email (awood@law.usc.edu). Thank you for your consideration of this wonderful attorney.

Best regards,

Abby K. Wood

Professor of Law, Political Science, and Public Policy
USC Gould School of Law

PABLO AABIR DAS
pabloaabirdas@gmail.com | +1-301-792-4158 | New York, NY

Writing Sample

This writing sample is an excerpt of a final paper I wrote for my Money in Politics seminar with Professor Abby Wood. I later converted the paper into a Note that was published by the *Southern California Law Review*. The paper was the winner of the Beverly Hills Bar Association Rule of Law Competition.

Using both a legal and a data-based analysis, the paper argues that state legislatures and courts inconsistently regulate campaign financing and voting, which is unjustifiable and also harms democratic principles.

For brevity, I have only included the introduction and the argument section of the paper. The complete Note can be found on the *Southern California Law Review* website.

VOTING AND CAMPAIGN FINANCING: INCONSISTENCIES IN LAW AND POLICY

I. INTRODUCTION

The right to vote in elections and the right to spend[1] in elections are both historically revered rights that function as critical elements of American democracy.[2] These rights have earned their salience because they are two of the most common and accessible mechanisms by which Americans can participate in the democratic process. In different ways, each right enables citizens to express their views of their elected representatives and to support causes they identify with, ultimately ensuring that government remains responsive to the needs of the electorate. Due to their vital roles within the democratic process, condoning the restriction of one of these rights while overlooking the regulation of the other undermines democratic principles.

Despite their shared value to democratic participation, the Supreme Court analyzes the right to vote and the right to spend through distinct doctrinal lenses. The Court's differential analysis manifests in significant regulation of voting but a more laissez-faire approach to spending. As a result, voting and spending rarely reference each other in jurisprudence and are infrequently compared. This has led to limited scholarship contrasting the Supreme Court's legal analysis of each right and even less of an examination into how the two rights relate at a policy level. Such a comparison is instructive when evaluating the transparency and integrity of the American electoral process. Indeed, if two core democratic rights are treated differently by both courts and

1. For the purpose of this Note, I am borrowing Professor Robert Yablon's concept of the "right to spend," which encompasses both political contributions and political expenditures. As both Professor Yablon and this Note point out, the Supreme Court has assessed regulations pertaining to contributions and expenditures differently, and when it is necessary to distinguish the Court's legal framework around these two issues, this Note will do so. *See* Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 658 n.9 (2017).

2. The first federal campaign finance law was passed in 1876, when the Naval Appropriations Bill became the first enacted law regulating how citizens could contribute to elected representatives. *See History of Campaign Finance Regulation*, BALLOTPEDIA, https://ballotpedia.org/History_of_campaign_finance_regulation [https://perma.cc/FAA3-VCCG]. Voting rights date back even further to the country's founding, but until the Fourteenth Amendment was adopted in 1868, such rights were primarily controlled by state legislatures.

legislatures, then the rationale behind such divergent treatment should be scrutinized. This Note explores how voting rights and spending rights interact at both the judicial and state policy levels. This Note's central argument is that voting and spending are closely related activities that are jointly paramount to the functioning of American democracy and, as a result, the inconsistent regulation of these two issues in jurisprudence and state-level policy is unjustified and detrimental to the democratic process.

This is a timely moment to explore the intersection of voting and spending, as both issues have come to the forefront of public discourse over the past several years. Since 2016, the media has prominently covered issues of voting integrity, and these concerns served as the primary flashpoint in the 2020 presidential election. Landmark court decisions like *Crawford v. Marion County Election Board*[3] and *Shelby County v. Holder*[4] contributed to the prevalence of voting rights issues, as both cases, in different ways, endorsed states' broad authority to impose voting restrictions. On the spending side, the last two presidential elections enjoyed historic contributions from major donors and political action committees ("PACs"),[5] while independent expenditures also reached an all-time high. This dramatic increase in political contributions and expenditures has underscored concerns around the sizable influence of money in politics. Moreover, in contrast to voting rights, spending rights are often protected by the Supreme Court. Notably, key decisions in *Citizens United v. FEC*[6] and *McCutcheon v. FEC*[7] limited states' ability to regulate campaign financing.

Policy developments around these rights are actively playing out in state legislatures across

3. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (plurality opinion).
4. Shelby County v. Holder, 570 U.S. 529 (2013).
5. A political action committee is an independent expenditure committee that typically spends money in support of a political candidate.
6. Citizens United v. FEC, 558 U.S. 310 (2010).
7. McCutcheon v. FEC, 572 U.S. 185 (2014) (plurality opinion).

the country. Since the 2020 elections, in response to unverified allegations of mass voter fraud, dozens of states have introduced bills to restrict voting access.[8] These bills have impeded voter registration options, limited vote-by-mail accessibility, and strengthened voter ID requirements. There is no indication that there is similar state-level interest to regulate spending. In fact, some state legislatures have relaxed campaign finance restrictions.[9] The reluctance of policymakers to take action on regulating spending is especially striking given that dark money groups[10] spent hundreds of millions of dollars in undisclosed political expenditures during the 2020 elections.[11]

Such policy shifts partially stem from the Supreme Court's divergent treatment of voting and spending rights. Disputes over voting restrictions, on the one hand, are typically analyzed under the Fourteenth Amendment to determine if a given voting law violates the Equal Protection Clause.[12] Challenges to spending laws, on the other hand, are usually evaluated under the First Amendment to establish whether a spending regulation excessively or improperly regulates free speech.[13] As a result of this bifurcated analysis, the Supreme Court tends to defer to states' discretion regarding voting laws while being wary of regulating spending due to sacrosanct First Amendment concerns.[14]

8. Ari Berman, *361 Voter Suppression Bills Have Already Been Introduced This Year*, MOTHER JONES (Apr. 1, 2021), https://www.motherjones.com/politics/2021/04/361-voter-suppression-bills-have-already-been-introduced-this-year [https://perma.cc/EW9W-PFFX]; *see also Voting Laws Roundup: February 2022*, BRENNAN CTR. FOR J. (Feb. 9, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022 [https://perma.cc/VN43-FLTU].

9. *See, e.g.*, Alex Sakariassen, *Pair of Bills Would Rewrite Montana's Campaign Finance Laws*, MISSOULA CURRENT (Feb. 20, 2021), https://missoulacurrent.com/government/2021/02/campaign-finance [https://perma.cc/JEV7-BZ3L].

10. Dark money groups are political nonprofit entities that have no legal obligation to disclose their donors. With minimal regulation or oversight, these groups often spend undisclosed amounts of money in support of political candidates.

11. *See* Anna Massoglia, *'Dark Money' Groups Pouring Millions into 2020 Political Ads with Even Less Disclosure*, OPENSECRETS (Sept. 11, 2020, 3:15 PM), https://www.opensecrets.org/news/2020/09/dark-money-pouring-920 [https://perma.cc/35J4-H6CT].

12. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–91 (2008) (plurality opinion).

13. *See* Citizens United v. FEC, 558 U.S. 310, 339–50 (2010).

14. While the Court's differential posture toward voting rights and spending rights has remained largely consistent since the late 1900s, this doctrinal divergence has been particularly prominent over the past decade. Since the 2010 elections, in the face of legal challenges, states have successfully adopted a variety of restrictions around voting rights, including additional voter ID laws, barriers to voter registration, limitations on absentee voting, and more. In fact, "[i]n 2016, [fourteen] states had new voting restrictions in place for the first time in a presidential election." *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Nov. 19, 2019), https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america [https://perma.cc/T7UG-FJVL]. On the other side, the Court has weakened states' capacity to regulate campaign financing—especially the regulation of expenditures. *See* Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 32 (2012) ("A striking feature of the Roberts Court is that, when it comes to the act of voting, the Justices are decidedly less skeptical of government restrictions [than campaign finance regulations].").

As the integrity of American elections comes under close scrutiny over the next several years, clearly defining the scope of voting rights and spending rights will be increasingly important. The Supreme Court has already recognized the significance and interrelation of these two rights and grouped them together under a broader "right to participate," defined as the most basic right in democracy.[15] Nevertheless, the Court continues to afford each right a differing level of judicial protection.

This Note explores both the Court's doctrinal divergence, as well as state-level policies regulating either right, in three Parts. The first Part describes the Supreme Court's legal analysis of both voting rights and spending rights. It proceeds to provide an overview of each right's respective legal framework as well as the notable cases that define each right. The Part concludes by evaluating the public policy imperatives that drive the regulation of either right. Through this jurisprudential comparison, this Part suggests that while the Court applies different levels of scrutiny to voting and spending regulations, the underlying public policy rationales that drive the regulation of these rights are almost identical.

In the second Part, this Note transitions to the policy realm and explores whether the state laws that regulate voting and spending actually further public policy imperatives such as election integrity. The analysis relies on a score-based methodology that calculates how many key spending regulations or voting restrictions each state has adopted. This score is then used to rank how regulatory each state is toward voting and spending, respectively. Ultimately, these scores determine that the policy disparity between voting restrictions and spending regulations is not as stark as the Court's doctrinal divergence. Moreover, this Part argues that although the overall

15. McCutcheon v. FEC, 572 U.S. 185, 191 (2014) (plurality opinion) ("There is no right more basic in our democracy than the *right to participate* in electing our political leaders. Citizens can exercise that right in a variety of ways . . . [,] [including] vot[ing] . . . and contribut[ing] to a candidate's campaign." (emphasis added)).

policy disparity is not pronounced, on a granular level, there are certain voting or spending laws that can predict the absence—or presence—of other voting or spending laws.

In the third Part, this Note argues that both the states' and the Supreme Court's approaches to regulating voting versus spending are unjustified and damage the basic principle of equal participation that underpins the political system. This Part first responds to arguments in defense of the existing regulatory disparity and then proceeds to lay out how this divergence negatively affects democratic values and practices.

III. THE RISKS OF INCONSISTENT REGULATION

A. OVERVIEW

The tension between restrictive voting laws and lax spending regulations is indicative of both courts' and legislatures' broader attitude toward election integrity. Repeatedly, even absent any evidence of fraud, voting rights have been trampled under the pretense of election integrity, while spending has remained less regulated. This Part will argue that this divergence is unjustified and undermines fundamental democratic principles.

Defenders of the status quo usually justify the puzzling dichotomy between voting restrictions and spending regulations with the constitutional defense: spending has been classified as a freedom of speech issue and voting as an equal protection issue. However, such a defense fails to explain the varying treatment of different spending regulations, is based on the incorrect assumption that hyperregulation of voting makes elections fairer, and is inconsistent with historical beliefs and the contemporary reality that both voting and spending regulation play a comparable role in ensuring election integrity and protecting democratic ideals.

Proponents of the constitutional defense often argue that the integrity of the voting process is

critical to the functioning of democracy; thus, voting restrictions are defensible in order to ensure that the system is fair and equal. However, these restrictions have led to a system that is all but fair and equal. The disenfranchisement of those without IDs, those incarcerated, or those unable to vote on Election Day due to accessibility issues undermines the very purpose of a representative democracy, since millions of votes are not cast. Moreover, while sensible voting restrictions certainly have a place within the democratic process, it is unclear whether states that have adopted stricter voting restrictions have actually experienced lower levels of voter fraud.[16]

Finally, the constitutional defense implies that voting and spending somehow operate on different democratic planes and that the hyperregulation of voting will lead to more integrous elections. This presumption is flawed for both historical and contemporary reasons. The Founders believed that democratic governance contained two key components: first, a government that "deriv[es its] just powers from the consent of the governed,"[17] and second, elected representatives that prioritize the interests of their constituents above their own.[18] In other words, from its inception, American democracy has been predicated not only on voting integrity but also on the expectation that elected representatives are devoid of corruption and beholden only to the will of their constituents.[19] In the modern election setting, voting and spending have joint importance in the roles that they play in getting candidates elected. While voting is often the focus of elections, the financing of the political process is similarly important. Spending is not only key for candidates' messaging and outreach but also is also important as an avenue for citizens to participate meaningfully in the democratic process.

16. *See* Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, BROOKINGS INST. (June 2, 2020), https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks [https://perma.cc/92VG-E4RX].

17. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

18. STEPHEN BREYER, ACTIVE LIBERTY 15–16 (2005).

19. *See* Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 101, 116 (2017) (arguing that electoral integrity is measured by a process that "effectuates the will of the voters and . . . does not create incentives that subsequently undermine the loyalty of elected leaders to their constituents").

B. THE CASE OF GEORGIA

Georgia best illustrates how many legislatures address election integrity, as it serves as a microcosm of the election integrity debate unfolding across the country. After the 2020 presidential election, President Trump alleged widespread voter fraud across the country, including in Georgia.[20] President Trump's allegations led to numerous lawsuits in the state and forced it to undergo two recounts and certify President Biden's victory multiple times.[21] Ultimately, in addition to certifying President Biden's win, Georgia election officials conducted a thorough investigation, concluding that there was no evidence of widespread voter fraud in the state.[22] Despite this determination, months later the Republican-controlled Georgia state legislature passed a sweeping voting-restriction bill. This bill included limitations on mail-in voting options, unlimited challenges to a voter's registration status, and additional voter ID requirements.[23]

While the Georgia bill has received harsh public criticism for its restrictiveness, what has received less attention is the fact that the bill was passed as the state simultaneously expanded spending rights, even in the face of serious campaign finance concerns. In 1974, Georgia was one of the few states that passed an ethics law creating a commission to oversee the role that money played in state politics.[24] This commission grew for over thirty years and, in 2008, closed over one hundred ethics cases related to campaign finance violations and collected hundreds of thousands of dollars in civil penalties.[25] However, from 2008 to 2013, the state cut the commission's budget

20. Reality Check Team, *Georgia Election: Donald Trump's Phone Call Fact-Checked*, BBC NEWS (Jan. 4, 2021), https://www.bbc.com/news/election-us-2020-55529230 [https://perma.cc/W3KB-XR38].

21. Amanda Zoch, *Georgia Completes Second Statewide Recount*, NAT'L CONF. STATE LEGISLATURES (Dec. 9, 2020), https://www.ncsl.org/research/elections-and-campaigns/georgia-completes-second-statewide-recount-magazine2020.aspx [https://perma.cc/U4ED-XC34].

22. Associated Press, *Investigators Say 'No Fraudulent Absentee Ballots' in Georgia County*, PBS (Dec. 30, 2020, 11:44 AM), https://www.pbs.org/newshour/politics/watch-investigators-say-no-fraudulent-absentee-ballots-in-georgia-county [https://perma.cc/J48H-ELB3].

23. Tessa Stuart, *Everything You Need to Know About Georgia's New Voting Law*, ROLLING STONE (Mar. 26, 2021, 11:18 AM), https://www.rollingstone.com/politics/politics-news/georgia-voting-bill-brian-kemp-voter-suppression-1147493 [https://perma.cc/8VSJ-A5HL].

24. COMMON CAUSE GA., ETHICS REFORM IN GEORGIA 1 (2018), https://www.commoncause.org/georgia/wp-content/uploads/sites/9/2018/03/Common_Cause_Georgia_Ethics_Report_2016.pdf [https://perma.cc/5QNL-3623].

25. *Id.* at 2.

by over forty percent, reducing its staff by nearly seventy percent.[26] After the dramatic downsizing of the commission's budget and capacity, in 2019 the remaining few members of the commission proceeded to raise state campaign contribution limitations.[27] This retreat from campaign finance oversight culminated in more "dark money" spending in the 2020 Georgia elections than any other congressional election.[28]

Despite the large amount of political spending in 2020, the Georgia state legislature has failed to meaningfully regulate such activity or even bolster disclosure laws in an effort to improve transparency.[29] In this sense, Georgia is an example of the current state of affairs when it comes to regulating voting versus spending. Although state election officials conclusively declared that no election fraud took place, the state legislature took a bevy of steps to restrict the free exercise of voting under the pretense of "election integrity." However, in the face of evident election integrity issues regarding dark money spending and campaign finance violations, the legislature is silent.

C. AN UNJUSTIFIED DIVERGENCE

As this Note observed in Part II, the regulatory paradox present in Georgia is not unique but instead is part of an established trend of inconsistent regulation of voting versus spending. At its core, this inconsistency has been justified by a belief that voter fraud is more damaging to American democracy than campaign finance violations. That is, voter fraud can fundamentally change the results of an election and undermine the democratic process, whereas campaign finance

26. *Id.*

27. Benjamin Keane & Robert Sills, *Georgia Campaign Finance Commission Raises Limits on State Election Contributions*, JD SUPRA (May 7, 2019), https://www.jdsupra.com/legalnews/georgia-campaign-finance-commission-42746 [https://perma.cc/4UX9-U84Z].

28. Ciara Torres-Spelliscy, *Dark Money in the 2020 Election*, BRENNAN CTR. FOR JUST. (Nov. 20, 2020), https://www.brennancenter.org/our-work/analysis-opinion/dark-money-2020-election [https://perma.cc/9P2C-UF2T]; Anna Massoglia, *Digital Ad Bans End for Georgia Runoffs, Opening the Door to More 'Dark Money,'* OPENSECRETS (Dec. 16, 2020, 1:41 PM), https://www.opensecrets.org/news/2020/12/digital-ad-bans-end-for-georgia-senate-runoffs [https://perma.cc/S35X-AQ9Z].

29. In February 2021, the Georgia Senate passed a bill that allowed the "governor, lieutenant governor, a party's nominee for those positions, and House and Senate Republican and Democratic leaders [to] create [leadership] committees," to which "lobbyists, industry associations or businesses" could donate as much money as they like. James Salzer, *Georgia Senate GOP Passes Bill to Get More Money from Big Political Donors*, ATLANTA J.-CONST. (Feb. 26, 2021), https://www.ajc.com/politics/georgia-senate-leaders-push-bill-to-get-more-money-from-big-political-donors/D3YV4C3NZNCEPG6TJ5PCABGPH4 [https://perma.cc/3ZBB-NNXD].

violations do not pose as profound of a threat. This argument notably overlooks how institutions treat allegations of voter fraud versus claims of campaign finance violations.

In recent decades, voter fraud—such as the use of fake IDs or manipulated mail-in ballots—has been exceedingly uncommon. Even when it happens, fraud rarely takes place on a scale significant enough to actually influence an election. However, even if voter fraud did exist at the level that voting-restriction proponents claim it does, immediate and often effective remedies exist for voting violations. Claimants of voter fraud can place the election results on hold until the alleged issue is adequately investigated. Consider the 2020 race for Iowa's 2nd Congressional District as an example. At the end of the voting period, Republican Mariannette Miller-Meeks led Democrat Rita Hart by only six votes.[30] Hart then claimed that ballots were improperly counted and proceeded to file claims with both the state canvassing board and the U.S. House of Representatives.[31] The House of Representatives refused to certify a winner and prepared to proceed with an investigation although they did not ultimately do so, since Hart withdrew.[32] Nevertheless, the various institutions available to investigate Hart's claim serve as a reminder that when elections are close and there are claims of ballot irregularities, there are a number of immediate remedies available to candidates.

The rapid adjudication of voting irregularities is best appreciated when contrasted with the remedies available for campaign finance violations. First, there are more windows for campaign finance violations to occur than for voter fraud to occur. While voter fraud takes place solely during the voting process, campaign finance issues arise during campaigning, elections, and even once an

30. Ben Kamisar, *Iowa Democrat Rita Hart Files Challenge to Six-Vote Defeat in the House*, NBC NEWS (Dec. 22, 2020, 9:45 AM), https://www.nbcnews.com/politics/meet-the-press/blog/meet-press-blog-latest-news-analysis-data-driving-political-discussionn988541/ncrd1252095 [https://perma.cc/BC8T-CLSX].
31. *Id.*
32. *Id.*

official is in office. If violations do arise, then the remedy is often slow, arduous, and, depending on the relevant disclosure laws, hard to detect. Once again, Georgia can serve as a useful example. In 2019, former Georgia Senator David Perdue was fined $30,000 for campaign finance violations.[33] Senator Perdue was penalized for accepting hundreds of thousands of dollars in campaign contributions that both exceeded the contribution limit and came from prohibited entities.[34] What was often overlooked in the coverage of Senator Perdue's penalty was the fact that the violations occurred five years prior, in 2014, during a race he ultimately won.[35] Unlike claims of voter fraud, which are often quickly apparent due to the closely monitored nature of elections, Senator Perdue's infractions were not detected until half a decade later, and when they were detected, his fine was a fraction of the amount of money he illegitimately received.

These examples are not to suggest that voting should have no restrictions, and campaign finance should be heavily regulated. Instead, they show that the inconsistent regulation of these similarly important rights is unjustified. Moreover, as the next section shows, the system as it exists has a detrimental impact on the modern democratic system.

Writing sample concluded. For the complete Note, please visit the Southern California Law Review website.

33. Russ Bynum, *Sen. Perdue's Campaign Fined $30,000 for Fundraising Violations*, PBS (Apr. 19, 2019, 6:28 PM), https://www.pbs.org/newshour/politics/sen-perdues-campaign-fined-30000-for-fun draising-violations [https://perma.cc/B9G5-M62H].
34. *Id.*
35. *Id.*

Applicant Details

First Name	**Michelle**
Last Name	**David**
Citizenship Status	**U. S. Citizen**
Email Address	**madavid@uchicago.edu**
Address	**Address** Street **633 S Plymouth Ct** City **Chicago** State/Territory **Illinois** Zip **60605** Country **United States**
Contact Phone Number	**8475284100**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**June 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kim, Hajin
hajin@uchicago.edu
773-702-9494
Templeton, Mark
templeton@uchicago.edu
773-702-9494
Macey, Joshua
jmacey@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.